Supreme Court, U.S.
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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

CHARLES GUNN,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,
NATURAL RESOURCES CONSERVATION SERVICES,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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86pp.

QUESTION PRESENTED

If Congress' exemption for "converted wetland" from the "swampbuster" provisions of the Food Security Act of 1985, is clear and unambiguous, did the Eighth Circuit of Appeals require the Respondent to apply Congress' exemption?

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This case presents an important question of federal law that has not been, but should be, settled by this Court; i.e., must the Eighth Circuit Court of Appeals require the Respondent to apply the clear and unambiguous Congressional exemption for "converted wetland" from the "swampbuster"

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PETITION FOR WRIT OF CERTIORARI

Charles Gunn, the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on July 7, 1997.

OPINIONS BELOW

The July 7, 1997, opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported

at 118 F.3d 1233 (8th Cir. 1997) and is reprinted in the attached Appendix to this Petition at App. pp. 2-20.

The prior opinion of the United States District for the Southern District of Iowa, Central Division, entered September 19, 1996, No. 4-95-CV-80373, is not published in a reporter, and is reprinted in the attached Appendix to this Petition at App. pp. 21-29.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on the 7th day of July, 1997. On August 19, 1997, Petitioner filed a Petition For Rehearing En Banc. On September 8, 1997, the Eighth Circuit denied Petitioner's Petition For Rehearing En Banc. (App. p. 1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The statute defining what land is exempt from the "swampbuster" provisions of the Food Security Act of 1985[1], is at 16 U.S.C. Section 3801(a)(4)(A)(App. p. 41).

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[1] Food Security Act of 1985, Public Law no. 99-198, 99 Stat. 1354. its provisions are codified at 16 U.S.C. Sections 3801 through 3849. Swampbuster provisions are codified at 16 U.S.C. Sections 3821-3823.

The statute describing what land is covered by the "swampbuster" provisions of the Food Security Act of 1985, is at 16 U.S.C. Section 3801(a)(18)(App. p. 42).

The statute making production of an agricultural commodity on wetland converted after December 23, 1985, ineligible for USDA programs is at 16 U.S.C. Section 3821(a)(App. p. 43).

The statute exempting converted "wetland" from the "swampbuster" provisions of the Food Security Act of 1985, is at 16 U.S.C. Section 3822(b)(1)(A)(App. p. 44).

The agency regulation meant to implement the statute's exemption of"converted wetland" is at Paragraph 7 C.F.R. Section 12.5(d)(App. p. 45).

The agency regulation meant to implement Congress' definition of "converted wetland" is at Paragraph 7 C.F.R. Section 12.2(a)(6)(App. p. 46).

The agency regulation meant to assist in the identification of "converted wetland" is at Paragraph 7 C.F.R. Section 12.32 (App. p. 47).

INTRODUCTION

Wetlands cover a large area of the United States. Wetlands are found in all

forty-eight lower states.[2]

Wetlands are transitional areas, lying between identifiable bodies of water and dry land.[3] Most scientists agree that wetland areas are characterized by the presence of: (1) Hydric soils,[4] which are typically saturated with water during much of the growing season; (2) Hydrophytic vegetation,[5] which is adapted to or tolerant of saturated soil; and (3) Sufficient water to support such

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[2] See Footnote 12, below.

[3] See Michael Williams, Wetlands: A Threatened Landscape 7-9 (1990).

[4] Hydric soils are "soils that are saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part." See Fish And Wildlife Service, Environmental Protection Agency, Dep't Of The Army, & Soil Conservation Service, Federal Manual For Identifying And Delineating Jurisdictional Wetlands Section 2.6 (1989)[Hereafter 1989 Federal Manual].

[5] Hydrophytic vegetation refers to: "Macrophytic plant life growing in water, soil or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content". 1989 Federal Manual Section 2.1.

vegetation.[6] For purposes of the Food Security Act of 1985, Congress defined hydric soil and hydrophytic vegetation at 16 U.S.C. Sections 3801(a)(8) and (9), respectively. The United States Fish & Wildlife Service has divided wetlands and associated deep water habitats into five ecological systems: (1) Marine, (2) Estuarine, (3) Riverine, (4) Lacustrine, and (5) Palustrine.[7] Wetlands can be further classified according to their dominant vegetation.[8]

The Palustrine System encompasses the vast majority of this countries inland marshes, bogs and swamps.[9] Portions of Petitioner's farm, in its natural state (i.e., prior to their conversion to crop ground in 1906) is known as Palustrine emergent wetlands which is dominated by grasses, rushes and sedges.[10]

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[6] See John G. Lyon, Practical Handbook For Wetland Identification And Delineation 20, 24 (1993).

[7] See U.S. Fish And Wildlife Service, Wetlands Of The United States: Current Status And Recent Trends 5 (1984) [Hereafter Current Status].

[8] See Current Status.

[9] See current status.

[10] These wetlands are called marshes, wet meadows, fens or inland salt marshes, depending on the region of the country

Until recently, wetlands were considered to be unproductive and even hazardous when left in their natural state. [11] Consequently, during the 19th and much of the 20th Century, both Federal and State Governments encouraged the sale and reclamation of wetlands so that they could be converted to more productive uses.[12] Reflecting this

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and the particular characteristics of the wetland area. See Elinor L. Horwitz, Counsel On Environmental Quality, Our Nations Wetlands 6 (1978) and Current Status at 9.

[11] See Michael Williams, Wetlands: A Threatened Landscape, Note 11, at 2; Steven L. Dickerson, The Evolving Federal Wetlands Program, 44 Sw. L. J. 1473-74 (1991) ("Wetlands have historically been regarded as wastelands, fit only for the breeding of mosquitoes, flies, and snakes."); Joan M. Ferretti, Restoring The Nations Wetlands: Can The Clean Water Acts Dredge And Fill Guidelines Do The Job?, 1 Pace Envtl. L. Rev. 105, 105-106 (1983)(In the past, wetlands were seen as unproductive until drained or filled).

[12] A 1990 study by the United States Fish and Wildlife Service estimates that by 1980, 53% of the 221 million acres of wetlands that existed in the lower 48 states in 1780 had been converted to farmland or other productive uses. U.S. GEN. ACCOUNTING OFFICE, WETLANDS OVERVIEW

attitude, almost 100 years ago this Court characterized wetlands as "the cause of malarial and malignant fevers" and opined that "the police power is never more legitimately exercised than in removing such nuisances." Leovy v. United States, 177 U.S. 621, 636, 20 S.Crt. 797, 803, 44 L.Ed. 914 (1900).

The widespread drainage of surface water in Iowa began shortly after enactment of the Federal Swamplands Act of 1849.[13] Under the 1849 Act and related

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11 (1991). Washington, D.C., Philadelphia, New York City, and several of the nation's largest coastal cities were built on wetlands. David Salvesen, The Urban Land Institute, Wetlands: Mitigating and Regulating Development Impacts 1, Page 1 (1990). Much of the conversion was encouraged by the Swamp Lands Acts of 1849, 1850, and 1860, in which Congress granted 65 million acres of wetlands to western states for "swamp reclamation". William L. Want, Law of Wetlands Regulation, Section 2.02(1), n. 29 (1989).

[13] Richard A. Bishop, Iowa's Wetlands, 88(1) Proc. of the Iowa Acad. of Sci. 11, 11 (1981). The State of Iowa originally contained an estimated 4 million acres of wetlands, an area equivalent to 11% of its total surface area. U.S. Dep't of the Interior, Fish and Wildlife Service, Wetland Losses in the United States; 1790's to 1980's, 6

legislation in 1850 and 1860, the Federal Government transferred 1.2 million acres of public domain wetlands to Iowa's prairie settlers for conversion to cropland.[14] Landowners drained the land by constructing ditches to speed the removal of surface water and later by installing subsurface tile waterways.[15]

Even today, Iowa law continues to provide two major sources of support for

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(1990). Most of Iowa's wetlands were small depressional wetlands, called "prairie potholes" created by glaciers that pushed across the northern portion of Iowa as recently as 13,000 years ago. Today, 95% to 98% of the state's original "prairie potholes" and other natural wetlands have been converted to farmland or other productive uses.

[14] Mary Ann Lee & Graham A. Tobin, An Evaluation Of Wetlands And Wetland Policies In Iowa, 22 (1982); Bishop Supra note 14, 11.

[15] Iowa Dep't of Natural Resources, Fish and Wildlife Div., Iowa Prairie Pothole Joint Venture Implementation Plan III (1990). The Reconstruction Finance Corporation (1935), the Flood Control Act (1944), and the Federal Watershed and Flood Prevention Act (1954) all supplied funds and technical assistance for the construction of drainage facilities throughout the United States and helped make possible the conversion of millions of acres of wetlands.

surface water drainage; (1) common-law and statutory protection of an individuals right to drain the land and (2) statutory authorization for the establishment of drainage districts.[16] The government's policy of encouraging the conversion of wetlands to croplands has been extremely successful. According to the United States Fish and Wildlife Service estimates, more than 85% of the wetlands converted between the mid-1950s and the mid-1970s were converted as a result of agricultural practices.[17]

Recently concerns about the environment has translated into

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[16] See 20 Drake L. Rev. 256, The Law Of Water Distribution In Iowa and South Dakota, A Comparison of the Riparian and Appropriative Systems By Max A. Gors; and Iowa Code Chapter 468 (1995). Section 468.1 gives the Board of Supervisors of each Iowa county the authority to establish drainage districts. Section 468.2(1) states that the drainage of surface waters from agricultural lands is presumed to be a benefit to the public and conducive to the public health, convenience, and welfare. Section 468.2(2) states that the provisions for drainage districts are to be "liberally construed to promote levying, ditching, draining, and reclamation of wet, swampy, and overflow lands."

[17] U.S. Fish And Wildlife Service, Wetlands of the United States: Current Status and Recent Trends 28 (1984).

legislation. The first major legislation was the Federal Water Pollution Control Act, Chapter 758, 62 Stat. 1155 (1948).[18] The first major piece of legislation directed toward agriculture wetlands was

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[18] This Act, commonly known as the Clean Water Act, is codified, as amended, at 33 U.S.C. Sections 1251-1387. The Clean Water Act is but one piece of legislation where Congress has acted to save remaining wetlands. Several Statutes authorize the Federal Government to acquire title to wetlands or to purchase easements to protect wetlands. For instance, the Migratory Bird Hunting Stamp Act, 16 U.S.C. Section 718a-718j (1988), requires hunters of migratory waterfowl to purchase licenses. The proceeds from the sale of the licenses are used to purchase wetlands and surrounding areas for use as refuges for waterfowl protection areas. Similarly, the Emergency Wetlands Resources Act of 1986, 16 U.S.C. Sections 3901-3932 (1988) & Supp. 4 (1992), authorizes the Federal Government to charge fees for admissions to wildlife refuges and to use the funds to purchase wetlands or interest in wetlands. The Water Bank Act, 16 U.S.C. Sections 1301-1311 (1988), authorizes the Secretary of Agriculture to purchase ten-year easements on wetlands and adjacent areas. In exchange for an annual payment, owners of wetlands agree to not drain, fill, or otherwise destroy their wetlands, and to implement conservation plans and practices to protect the wetland habitat.

that portion of the Food Security Act of 1985 commonly known as "swampbuster".[19]

Swampbuster prohibits farmers who convert wetlands into cropland after December 23, 1985, from participating in and receiving benefits from most USDA programs. See 16 U.S.C. Sections 3821 thru 3823. Swampbuster did not make it illegal to convert wetlands to agricultural use but it established financial incentives so strong that most farmers had little choice but to comply. For example, if, while farming 1,000 acres, the farmer converts one acre of wetlands to agricultural use, the farmer lost eligibility to participate in farm government programs for the entire 1,000 acres; not just the one acre converted. Conversion of wetlands (with some exceptions not relevant here) results in a farmers loss of eligibility for (1) price and income supports, (2) disaster payments, (3) crop insurance, (4) FmHA loans, (5) Commodity Credit Corporation storage payments, (6) farm storage facility loans, (7) conservation reserve program and annual payments, and (8) dairy refund payments. 16 U.S.C. Section 3821(1). 7 C.F.R. Section 12.4(c).

Beginning December 23, 1985, the

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[19] Food Security Act of 1985, Public Tub. Law No. 99-198, 99 Stat. 1354. Its provisions are codified at 16 U.S.C. Sections 3801 through 3849. Swampbuster provisions are codified at 16 U.S.C. Sections 3821-3823.

event that triggered the loss of USDA program benefits was the producing of an agricultural commodity on a converted wetland. Since then, an additional triggering event was added by Congress. Effective November 28, 1990, USDA program benefits are lost if there is either the producing of an agricultural commodity on a converted wetland or the actual conversion of a wetland to agricultural use. 16 U.S.C. 3821; 7 C.F.R. Section 12.4(a)(1). The conversion of wetlands for purposes other than the production of an agricultural commodity does not result in the loss of USDA program benefits. 7 C.F.R. Section 12.5(b)(ii).

Swampbuster is supplemented by USDA regulations.[20] In addition, to assist it in making its decisions, the USDA uses USDA Agency Manuals[21] and a Federal Manual.[22]

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[20] 16 U.S.C. Section 3844; 7 C.F.R. Part 12.

[21] Agricultural Stabilization and Conservation Service Highly Erodible Land Conservation And Wetland Conservation Provisions (1986) and Soil Conservation Service, National Food Security Act Manual interpreting and explaining USDA regulations.

[22] Federal Manual For Identifying And Delineating Jurisdictional Wetlands, 56 Fed. Reg. 40,446 (proposed August 14, 1991)(hereafter Federal Manual).

Initially, Congress exempted four types of wetlands from swampbuster regulation. 16 U.S.C. Section 3822(b). Of the four, only the first is involved in this petition; i.e., "Swampbuster" does not apply to "converted wetlands", i.e., wetlands on which a conversion to crop ground was commenced before December 23, 1985. 16 U.S.C. Section 3822(b)(1)(A).

STATEMENT OF THE CASE

A. Nature Of The Case.

This petition involves Petitioner's assertion that the USDA did not follow the clear and unambiguous Congressional exemption of his "converted wetland" from the "swampbuster" provisions of the Food Security Act of 1985. This matter does not involve agency discretion. Gunn has continually, but to no avail, pointed out that the USDA's determination does not follow the clear and unambiguous Congressional intent.

Petitioner and his predecessors have farmed 160 acres of Iowa land since 1906. Prior to 1906, wet or swampy areas precluded the effective crop farming of all 160 acres. This changed with the installation of drainage tiling completed in 1906 by Greene County Drainage District No. 5. A 28-inch drainage tile main with two laterals attached was buried. From that time onward, all the ground (including the ground above the 28-inch main and laterals) has been farmed; i.e., none of the ground was left

in a wetland state. As farming practices changed, additional laterals were buried allowing for increased crop production. As early as 1947, the 28-inch main was insufficient to provide an outlet to drain the land adequately. The inadequacy was due to additional laterals hooked up to it both on Petitioner's land as well as other land draining into his. In 1992 the problem was corrected by replacing the 28-inch main with an open ditch. The USDA determined that the replacement constituted a conversion of wetlands. (App. pp. 33-36). Initially, the USDA classified 10.8 acres as "converted wetlands", but as each level of appeal passed, the USDA increased the number of acres until, at the last level, the USDA concluded 28.2 acres of Petitioner's crop land had been converted in violation of the Food Security Act of 1985. (App. pp. 37-40). After exhausting his administrative appeals Petitioner filed suit in the Federal District Court contesting the USDA's determination because the 1906 tiling constituted a "commenced" conversion intended by Congress to be exempt from "swampbuster". The District Court upheld the USDA's determination. Petitioner then appealed to the Eighth Circuit, but it, too, upheld the USDA's determination.

B. Proceedings Before The USDA.

By letter dated April 26, 1991, the SCS advised Petitioner that 32.9 acres of his farm was classified by it as "farmed wetlands". (App. p. 37). Gunn was advised that the existing drainage

systems on the "farmed wetlands" could be maintained, but not improved. Gunn, believing the acres were "prior converted" (because of the pre-December 23, 1985 tiling) appealed the decision. Gunn's appeal was considered and the classification was upheld. Gunn, still believing the proper classification to be "prior converted", appealed to the next level of agency review. After further review, the classification was upheld. At each level of the review, it was the SCS's position that because there was not sufficient tiling of the land to adequately drain the land and remove all wetland hydrology the land would not be classified "prior converted". Gunn did not appeal further. (App. pp. 22-23).

As early as January 25, 1991, the USDA became aware that the Trustees for the Drainage District that originally installed the 28-inch tile main were considering improvements to the 28-inch tile main.

When the Drainage District replaced the 28-inch tile main with the open ditch, a number of additional tile lines across Petitioner's property were discovered. An engineering analysis was requested and after review of the affect of the additional tile lines, the USDA determined it would uphold the original classification of "farmed wetlands" because (according to its guidelines) the newly discovered tile lines were still inadequate to provide a drainage coefficient that the USDA required to classify the area as "prior converted"

wetland. By letter dated November 13, 1992, the USDA notified Petitioner that even with the additional tile lines his tiling was still inadequate to provide the drainage level required by the SCS and the original call of "farmed wetland" would stand. But, due to the Drainage District activities, the 32.9 acres had been reclassified to 18.7 acres of "farmed wetland" and 14.2 acres of "converted wetland". (App. p. 38). Petitioner was told he could farm the 18.7 acres without loss of farm program benefits, but he could not farm the 14.2 acres without loss of farm program benefits. Petitioner appealed. After review, the USDA upheld its November 13, 1992 determination. Petitioner appealed. After further review, the determination was upheld, except that 5.3 acres was changed to the classification of "prior converted" wetland while the number of "farmed wetland" acres was reduced to 16.8 acres and the number of "converted wetland" acres was reduced to 10.8 acres (App. p. 39). Petitioner appealed. The classification of 10.8 acres as "converted wetland" precluded Petitioner from farming it in 1993, costing him an estimated $1,080.00. (App. p. 35). After further review, the USDA's determination was upheld but the classification was changed to 17.0 acres of "converted wetland" and 3.6 acres of "farmed wetlands". Petitioner appealed. The classification of 17.0 acres as "converted wetland" precluded Petitioner from farming it in 1994, costing him an estimated $1,740.00. (App. p. 35). By letter dated October 12, 1994, the last

level of agency review upheld the December 21, 1993 determination, however, the number of "farmed wetlands" acres was reduced even further to 4.5 acres while the number of "converted wetland" acres was increased to 26.4 acres and the "prior converted" acres was done away with all together. (Jt. A. 76-80). By letter dated October 31, 1994, Petitioner was advised that the SCS classification for "converted wetlands" was erroneous; the correct number being 28.2 acres. Also by date of October 31, 1994, Gunn was sent a corrected Wetland Conservation Determination confirming the final classification to be 28.2 acres of "converted wetland" due to the Drainage District activities. (App. pp. 23-24 and 40). The classification of 28.2 acres as "converted wetland" precluded Petitioner from farming it in 1995 (and each year thereafter until the Court rules) costing him an estimated $2,820.00 per year. (App. p. 35).

C. Proceedings In The District Court.

Petitioner asked the District Court to enter a declaratory judgment ruling that Gunn was entitled to crop his farm land as either ordinary farm land or as a "prior converted" wetland. Even though asked to, the District Court did not address the Congressional exemption from "swampbuster" for "converted wetland." The District Court found the USDA's enforcement of the Food Security Act of 1985 reasonable. (App. pp. 26-27).

D. Proceedings In The Court Of Appeals.

Petitioner appealed the District Court's failure to find USDA's determination contrary to Congressional intent. The Eighth Circuit affirmed. (App. pp. 11-14). In doing so, the Eighth Circuit sided with the USDA's interpretation of the statute without first ascertaining Congress' intent as required by this Court in Chevron USA, Inc. v. Natural Resources Council, Inc., 467 U.S. 837 (1984).

REASON FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. DID THE COURT OF APPEALS REQUIRE THE RESPONDENT TO FOLLOW THE CLEAR CONGRESSIONAL INTENT IN APPLYING THE CONGRESSIONAL EXEMPTION FOR "CONVERTED WETLAND" FROM "SWAMPBUSTER".

When agency action violates Congressional intent, the agency's actions are not entitled to deference. Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125, 105 S.Ct. 1102, 1107-08, 84 L.Ed.2d 90 (1985). If agency action violates Congressional intent, the reviewing Court must reject administrative constructions which are contrary to the clear Congressional intent. Chevron E.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). Accordingly, this

Court must review the USDA's conduct in light of the language and legislative history of the 1985 Farm Bill, as amended.

Due to the Drainage District's replacement of the 28-inch tile main with an open ditch, Petitioner was advised that if he produced an agricultural commodity on the "converted wetland" acres, he would lose his eligibility to participate in government farm programs. Petitioner, believes because of the 1906 tiling that his affected acres are "prior converted" wetlands exempt from "swampbuster".

As the USDA sees it, even though the 28.2 acres were no longer wetland and had been farmed since 1906, the drainage could only be maintained, not improved. The question then becomes one of whether or not Congress intended to exempt from "swampbuster" land which was no longer wetland because it had been converted to agricultural use. A review of the statute and its legislative history answers the question with a clear "yes".

When Congress enacted the Food Security Act of 1985, it exempted from "swampbuster" the conversion of wetland to agricultural use commenced before December 23, 1985. Food Security Act of 1985, 99 Stat. 1508; 16 U.S.C. Section 3822(b)(1)(A). Congress hasn't changed this exemption since its enactment. Simply stated, the exemption provides that a farmer is not ineligible from participating in government farm programs

if he produces agricultural commodities on converted wetland if the conversion of the wetland was commenced before December 23, 1985.

When interpreting a statute construed by an administrative agency, the first task is to consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; . . .[but] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). As such, the first thing to do is to turn to the language of "swampbuster" itself. Mead Corp. v. Tilley, 490 U.S. 714, 722, 109 S.Ct. 2156, 2162, 104 L.Ed.2d 796 (1989); Mallard v. U.S. Dist. Court For Southern Dist. of Iowa, 490 U.S. 296, 109 S.Ct. 1814, 1818, 104 L.Ed.2d 318 (1989).

The District Court found Congress' intent to be silent or ambiguous and held the USDA's construction of the "commenced" exemption reasonable. Congress was not silent. Congress was not ambiguous. Congress spoke directly to when the converted wetland exemption commences. The operative terms are "converted wetland" and "commenced". Congress defined "converted wetland". Food Security Act of 1985, 99 Stat. 1504; 16 U.S.C. Section 3801(a)(4)(A).

Congress hasn't changed this definition since its enactment. Simply stated, and as applied to Gunn's situation), Gunn's wetland became "converted wetland" when the draining of the wetland made the production of an agricultural commodity possible. Congress did not define the word "possible". However, the fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as having their ordinary, contemporary, common meaning. Asgrow Seed Co. v. Winterboer, ___ U.S. ___, 115 S.Ct. 788, 793, 130 L.Ed.2d 682 (Iowa 1995). The word "possible" ordinarily means capable of being, becoming, or coming to pass; not contrary to the nature of things; neither necessitated nor precluded; free to happen or not. Blacks Law Dictionary, p. 1166 (6th Ed. 1990)[23]. In Petitioner's case the word only requires that the drainage (tiling) on his farm be sufficient for the purpose or effect of making agricultural products grow. As such, once the drainage tile on that portion of Petitioner's 160 acres was buried, thereby making the production of agricultural commodities possible, the

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[23] Indeed, some dictionaries give as one meaning of "possible" simply "capable of happening". See, e.g., the Random House Dictionary Of The English Language, p. 1123 (The unabridged Ed. 1971). See also Webster's Third New International Dictionary of the English Language, Unabridged, p. 1771 (1993); 33 Words and Phrases, "Possible".

land, for purposes of "swampbuster," became converted wetland. This is the plain meaning of Congress' definition. The statutes plain meaning must be enforced. U.S. Nat. Bank of Or. v. Independent Ins. Agents, 508 U.S. 439, 113 S.Ct. 2173, 2182, 124 L.Ed.2d 402 (1993). In this regard, not only did the drainage tiling make the production of agricultural commodities possible, the production of agricultural commodities has been the case since 1906.

When we compare the USDA's regulations regarding "converted wetland" with the statute, we see that the regulations do not comply with the intent of Congress. While, the regulations define "converted wetland" the same as Congress (7 C.F.R. Section 12.2(a)(6)) a later regulation setting out the identification criteria for converted wetland, does away with the intent of Congress. The later regulation states that wetland will not be considered converted if "it is determined that the actions of the persons producing such agricultural commodity does not permanently alter or destroy natural wetland characteristics. Compare 7 C.F.R. Section 122(a)(b) with 7 C.F.R. Section 12.32(a) and (b)(2). Contrary to Congress' intent of "possible", the USDA regulations deny "converted wetlands" status unless (in Petitioner's case) the draining permanently altered or destroyed the natural wetland characteristics. Congress didn't make that the criteria. If Congress had wanted to make that the criteria, they could have. Not having

done so, the regulations are contrary to the clear intent of Congress.

Lending assistance to Petitioner's view is the legislative history. In the process of enacting the 1985 Farm Bill, both the House and the Senate passed separate versions of the legislation which were sent to Conference Committee. In dealing with the two different versions, the Conference Committee Report noted:

> "(7) Exemption from wetland (sec. 1222)
>
> (a) The House bill exempts converted wetland from the program ineligibility provision of Section 1202 [16 U.S.C. Section 3821] <u>if the land became converted wetland before the date of enactment</u> of the bill (Sec. 1203(a)(6)."

The Senate amendment exempts converted wetland <u>if the conversion of the wetland was commenced before the date of enactment</u> of the bill. (Sec. 1622(a)(1).

The Conference substitute adopts the Senate amendment. <u>The conferees intend that conversion of wetland is considered to be "commenced - when a person has obligated funds or begun actual</u>

modification of the wetland." [24] (Underlining supplied by the undersigned.)

The Conference Committee clearly chose to exempt from wetland regulation conversions that commenced before December 23, 1985. Pivotal to Congress' intent is their requirement that the activity causing the conversion of a wetland begin prior to December 23, 1985. Congress was not concerned with how successful the conversion was, only that the conversion have the effect or be for the purpose making the production of an agricultural commodity possible. A Conference Committee Report is very persuasive evidence of Congressional intent (besides the statute itself). Even though the Conference Committee could have adopted a modified version of the House and Senate versions (as the USDA Regulations do) because it didn't, it is clear Congress ruled out the limitation of "or completed" altogether. More importantly, by doing so, Congress' clear intent was to exempt any conversion so long as it was commenced before December 23, 1985, regardless of when it was completed. The very facts of this case, underscore Congress' wisdom. Like buildings built years ago, in order to

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[24] U.S.C. Congressional and Administrative News, 99th Congress - - First Session, 1985, Volume 3, Page 2386. The House and Senate agreed to the Conference Committee Report on December 18, 1985. Id., Vol. 1, 99 Stat. 1660.

meet present needs, they must be improved as well as maintained. But if a building is only maintained, that doesn't mean the building returns to vacant ground. Similarly, roads laid in the day of the Model "A", must be improved, as well as maintained, to meet the needs of modern transportation. However, only maintaining a road doesn't mean the road reverts to being open prairie. When something is changed from its natural state, it doesn't revert back to its natural state with only maintenance of the changes. Conversely, improving the changes doesn't convert the property; the conversion was occasioned upon the first initiated change. So, what were acceptable drainage practices in the early 1900's is not, now, and an open ditch, rather than a buried tile, better meet the needs of today's farming. However, the conversion to cropland took place with the initial tiling. In implementing "swampbuster", Congress' intent was to bring to a stop the conversion of wetland into cropland. As the facts of this case show, Gunn's wetland had already been converted to cropland before "swampbuster". The Drainage District replacement of the tile with an open ditch did not change that. To hold otherwise means that, eventually, all Drainage Districts will cease. If a farmer cannot continue to use his farmland once converted to the production of agricultural commodities, eventually it will be too costly to just continue the maintenance of the drainage tile. The return from only maintaining the drainage tile will not produce a profit

and the USDA's interpretation will force abandonment of a substantial amount of prime farmland in the United States.

Statements made by key legislators during the debate on the Food Security Act of 1985 lend further support to Gunn's interpretation of the plain meaning of 16 U.S.C. Section 3822(b)(1)(A):

> "On Wednesday, July 31, 1985, the Committee returned to the Conservation Title. Mr. Daschle was recognized to offer a clarifying amendment to the previous adopted swamp-buster provisions. Mr. Daschle briefly explained the provisions of the amendment. Mr. Lewis offered an amendment to the amendment to clarify that the definition of wetlands would not simply include wet soils. Mr. Daschle said he would accept the amendment. The Committee agreed to the Lewis amendment by voice vote. Mr. Daschle and Mrs. Lewis discussed the question of cropland that has been flooded and later reclaimed. Mr. Daschle stressed that the amendment would not affect the use of this land because if production was underway at any time in the past, the land would be grandfathered.

(emphasis added)."[25]

Mr. Daschle's use of the term "grandfathered" is not unusual for lawmakers. In the area of legislation, the term has come to have an ordinary and well understood meaning. To be "grandfathered" means there is a provision in a statute which is "an exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction." Blacks Law Dictionary, 699 (6th Ed. 1990). Mr. Daschle's comment is of significant importance, because it refutes the position of the USDA. The USDA takes the position that if the tiling is not sufficient to drain the ground so that no flooding occurs, then you can't improve the draining to do away with it. In response, Mr. Daschle notes that even if land was flooded and later been reclaimed, the "swampbuster" provisions would not affect the use of the land because "if production was underway at any time in the past", the land would be exempted from "swampbuster".

As additional evidence of Congress' intent, we have the following explanation of the purpose of "swampbuster".

> "Wetland Conservation. <u>The purpose of the wetland conservation subtitle of the</u>

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[25] Report of House Committee on Agriculture, Page 419, July 31, 1985.

> Committee is to discourage the draining and cultivation of wetland that is unsuitable for agricultural production in its natural state. This purpose will be realized by limiting an agricultural producer's access to various price support, production adjustment, Federal Crop insurance, Federal crop insurance, Federal disaster loans and payments, and various other programs carried out by the Federal Government if the producer drains and plants crops on natural wetland. (Underlining supplied by the undersigned)."[26]

Because the purpose of Congress was to discourage converting land so as to begin agricultural production, it is obvious that Gunn's land that has been drained and continuously cropped for 87 years was intended to be exempt from "swampbuster".

CONCLUSION

For all the reasons noted above, Petitioner respectfully requests the Court grant his Petition for Writ of Certiorari and reverse the decision of the Eighth Circuit.

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[26] Id. at September 30, 1985.

Respectfully submitted,

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BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3995

CHARLES GUNN,

Appellant,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES CONSERVATION SERVICES,

Appellees.

ORDER DENYING PETITION FOR REHEARING EN BANC

Filed: September 8, 1997

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order entered at the direction of the Court:

Attest: Michael E. Ganns

Clerk, United States Court of Appeals, Eighth Circuit.

App. 2

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3995SI

Charles Gunn,	)	
	)	
Appellant,	)	
	)	On Appeal From
vs.	)	the United
	)	States
United States Department	)	District Court
of Agriculture and	)	for the
Natural Resources Conser-	)	Southern
vation Service,	)	District of
	)	Iowa
Appellees.	)	

Submitted: May 19, 1997

Filed: July 7, 1997

Before RICHARD S. ARNOLD, Chief Judge, BOWNMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

Charles Gunn filed this action in the District Court[1] to challenge the Soil

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[1] The Hon. Charles R. Wolle, Chief Judge, United States District Court for the Southern District of Iowa.

Conservation Service's (SCS[2]) determination that certain parts of his farmland were converted wetlands and could therefore not be farmed without his losing eligibility for certain farm benefit programs. The District Court held that the SCS's regulations are a reasonable interpretation of the pertinent statute, 16 U.S.C. Sections 3801, 3821-24, and that the SCS's determination that the lands were wetlands was supported by substantial evidence. The Court dismissed Gunn's taking-by-inverse-condemnation claim for lack of jurisdiction. We affirm.

I.

Gunn owns 160 acres of land in Iowa that he and his predecessors-in-interest have farmed since 1906. Before that time the acreage was wetlands and not arable. In 1906 the local drainage district installed tiles under the land to drain the excess water from the land. Other tiling allowed water from neighboring farmland to drain across Gunn's land. By 1947, additions to the drainage system

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[2] The SCS, an agency within the Department of Agriculture, was abolished in 1994, and its functions were transferred to the Natural Resources Conservation Service. See Pub. L. No. 103-354, Sect. 246, 108 Stat. 3178, 3223-25 (1994)(codified at 7 U.S.C. Sect. 6962). For ease of reference, we use the term SCS throughout the opinion.

had increased the drained area so that the amount of water in some years exceeded the capacity of the system, leaving parts of Gunn's land wet and unsuitable for farming. Realizing that a drainage problem existed, the drainage district in 1992 installed new drainage tiles and dug an open ditch on Gunn's land that remedied the system's shortcomings.

In order to combat the disappearance of wetlands through their conversion into crop lands, Congress passed a law known commonly as "Swampbuster." Food Security Act of 1985, Pub. L. no. 99-198, Sections 1201, 1221-23, 99 Stat. 1354, 1504-08 (codified as amended at 16 u.S.C. Sections 3801, 3821-24). This law did not make illegal the conversion of wetlands to agricultural use, but did provide that any agricultural production on a converted wetland would cause the farmer to forfeit his eligibility for a number of federal farm-assistance programs. Among the exemptions to the provisions of Swampbuster is one for wetlands that had been converted to agricultural production before December 23, 1985. See Section 3821(d). The farming of such previously converted wetlands does not make the farmer ineligible for benefits.

In order for a farmer to participate in the benefits programs, he must certify his eligibility to the SCS. The SCS determines whether the land for which a farmer seeks benefits contains wetlands that have been converted for agricultural

purposes. Charles Gunn sought certification in 1991, and was told by the SCS that his farm contained 32.9 acres of "farmed wetlands," which are, in essence, wetlands that are sometimes dry enough to farm. The SCS advised Gunn that he could continue to farm these lands as well as maintain the existing drainage system, but if he wished to remain eligible for benefits he could not improve the land's drainage. This ruling was upheld after an appeal within the agency. Gunn did not seek further review.

In 1992, the local drainage district improved the drainage system, as noted above. In the process of analyzing the new system, SCS discovered that the previous drainage system had had a greater capacity than previously realized, but still had been insufficient to drain the land completely. It also determined that because the new system completely drained the land, part of Gunn's land now constituted converted wetlands. After a series of appeals within the agency, the SCS concluded that 28.2 acres of Gunn's land were wetlands that had been converted by the drainage district's recent activities and could not be farmed by Gunn without his losing eligibility for farm benefit programs.

Gunn then filed this action in the District Court, seeking a declaratory judgment that he was entitled to farm this land without losing benefits, and damages for his not having farmed the lands during the decision and appeal

process. In the alternative, if the converted wetlands determination was upheld, he sought compensation for a taking of land by inverse condemnation. The District Court held that the classification of the lands as converted wetlands was reasonable, denied Gunn's desired declaration, and refused to award damages. it also dismissed the takings claim for lack of jurisdiction because Gunn sought compensation in an amount greater than $10,000, a claim over which the Court of Federal Claims has exclusive jurisdiction. See 28 U.S.C. Sections 1346, 1491. The District Court also stated that the government's action was not a taking. Gunn then took this appeal.

II.

Gunn challenges the SCS's decision in two ways. First, he contends that the pertinent regulations are neither consistent with, nor a reasonable interpretation of, the Swampbuster statute. Second, he argues that the SCS failed to follow its own regulations in deciding his eligibility. We hold that the regulations are consistent with the statute and that the SCS followed those regulations in its decision-making process.

A.

The statute makes ineligible for benefits, listed at 16 U.S.C. Section 3821(b), any person who "converts a wetland by draining, dredging, filling,

leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland . . . for that crop year and all subsequent crop years." Section 3821(c). it also makes ineligible for these same benefits, such as crop insurance, price supports, and government-sponsored loans, any person who "produces an agricultural commodity on converted wetland." Section 3821(a). The act defines a converted wetland as a "wetland that has been drained, dredged, filled, leveled or otherwise manipulated" so that agricultural production is made possible. Section 3801(a)(6)(A). The statute provides one exception relevant to this case; no person becomes ineligible for agricultural production on converted wetlands "if the conversion of the wetland was commenced before December 23, 1985." Section 3822(b)(1)(A).

The SCS has promulgated regulations to refine the scope of these provisions. Gunn contends the regulations are contrary to the plain language of the statute, and, if the statute is ambiguous, that the regulations are not a reasonable interpretation under the rule of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Therefore, he argues, the decision by the SCS is invalid. We disagree, and conclude that the regulations carefully follow the statutory language and are reasonable interpretations of any statutory ambiguities.

The first aspect of the regulations that Gunn challenges is their definition of a converted wetland. He contends that the definitions at 7 C.F.R. Section 12.2(a)(6) & 12.32 (1992) are contrary to the statute. Section 12.2(a)(6) defines converted wetlands in terms virtually identical to those used in the statute.[3]

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[3] 16 U.S.C. Section 3801(a)(6)(A) provides that:

The term "converted wetland" means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if

(i) such production would not have been possible but for such action; and

(ii) before such action --

(I) such land was wetland, and

(II) such land was neither highly erodible land nor highly erodible cropland."

In comparison, 7 C.F.R. Section 12.2(a)(6)(A) provides that:

Converted wetland means wetland that

Section 12.32(a) lists factors that are to be considered in determining whether a wetland has been converted, such as whether woody hydrophytic vegetation has been removed. Finally, Section 12.32(b), which accords with the exception provided by 16 U.S.C. Section 3801(a)(6)(B), explains that a wetland shall not be

---

> has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) that makes possible the production of an agricultural commodity without further application of the manipulations described herein if (i) such production would not have been possible but for such action; and (ii), before such action such land was wetland and was neither highly erodible land nor highly erodible cropland.

Gunn points to the phrase "without further application of the manipulations described herein," which is in the regulation but not in the statute. We do not see what of substance this phrase adds or changes. Under the statute, conversion occurs when wetland is "manipulated" with a certain effect. The regulation simply underscores that it is the initial manipulation, not some subsequent "applications" of it, that is to be considered for this purpose. This is a reasonable interpretation of the statute.

considered converted just because natural conditions, such as drought, allow a farmer to cultivate certain land, so long as that farming does not "permanently alter or destroy natural wetland characteristics" -- the farmed-wetlands exception. We perceive no inconsistency between the regulations and the statute they are intended to effectuate. Rather, they provide scientifically defined bases for determining whether the provisions of the statute have been violated. Such expert refinements are well withing the purview of the SCS, and do not make its determination in Gunn's case invalid.

Next, Gunn challenges the regulations' definition of "commenced." The statute allows the farming of wetlands the conversion of which was commenced before December 23, 1985, without the farmer's losing benefits. The regulations allow a farmer to demonstrate that he has commenced the conversion in one of two ways: by showing he has actually dredged, drained, filled, leveled, or otherwise manipulated the wetlands before the given date, 7 C.F.R. Section 12.2(a)(6) & 12.5(b)(3)(i), or that he has contractually committed substantial funds to someone else who will perform these activities, Section 12.5(b)(3)(ii). Gunn reads the substantial-funds requirement to have impermissibly narrowed the statutory term "commenced" from what Congress intended. Von Eye v. United States, 92 F.3d 681, 685 (8th Cir. 1996), which considered the application of the requirement, suggests it did not. Moreover, the substantial-

funds provision allows a farmer to come within the exception not only by actually starting the land-moving activities, as the statutory term "commenced" naturally suggests, but also by simply comitting to have such activities undertaken in the future. Gunn has not shown that the 1992 conversion was commenced under either the statutory definition or the definition in the regulations. Any discrepancy between the two, therefore, does not change the conclusion that his wetlands do not come within the exception for previously converted wetlands.

Alternatively, Gunn could succeed on his claim if he had actively pursued this particular conversion since before December 23, 1985. Downer v. United States, 97 F.3d 999, 1004 (8th Cir. 1996). The initial improvement took place in 1906, and the SCS told Gunn he could maintain that drainage system without losing benefits. (This accords with Von Eye, 92 F.3d at 685, which allows post-1985 conversions only to the extent of plans already in place in 1985.) In 1992 another conversion took place. Gunn has not demonstrated that the two constructions, over 80 years apart, were actually one actively pursued conversion. To the contrary, the 1906 work achieved what was intended, even though it later proved inadequate.

Gunn also argues--and this may be his principal point--that he is entitled to an exemption under the plain words of the statute. Section 3822(b)(1)(A) of Title 16 provides, in relevant part, that

"[n]o person shall become ineligible . . . for program loans or payments . . . [a]s the result of the production of an agricultural commodity on . . . [a] converted wetland if the conversion of the wetland was commenced before December 23, 1985." Gunn claims that his land fits this definition, because, in his view, it became a converted wetland in 1906, at the time of the initial improvements. He points to the definition of the term "converted wetland" in 16 U.S.C. Section 3801(a)(6)A). This provisions reads, in pertinent part, as follows: "'converted wetland' means wetland that has been drained . . . or otherwise manipulated . . . for the purpose or to have the effect of making the production of an agricultural commodity possible if . . . before such action . . . such land was wetland . . ." In 1906, Gunn says, his land was drained or otherwise manipulated both for the purpose and with the effect of making the production of agricultural commodities possible. This production, in fact, has continued ever since. Accordingly, the land became "converted wetland" before December 23, 1985, and remains in that classification forever, whatever may have happened later.

We agree with Gunn that the words of the statute, considered in isolation, can bear the meaning for which he contends. The agency's interpretation, however, is different, and we believe that the interpretation is sufficiently plausible to meet the Chevron test. The agency stresses the requirement that "converted

wetland" is land that before drainage "was wetland." On this view, land is either wetland or converted wetland. If significant wetland characteristics remain, the land remains wetland and cannot be converted wetland. If the drainage or other manipulation has been sufficient to make crops producible, as is the case here, the land is best described as "farmed wetland," a term that does not appear in the statute but that the agency's regulations have adopted. "Farmed wetland" can continue to be farmed without the loss of benefits, but only so long as the previously accomplished drainage or manipulation is not significantly improved upon, so that wetland characteristics are further degraded in a significant way. In the present case, of course, the 1992 improvements have done exactly that. They were designed to and have in fact further degraded the wetland characteristics of the farm. It follows that part of the farm is "converted wetland," but that it did not become converted wetland until 1992.

This interpretation also accords with the general purpose of the statute--to preserve those wetland characteristics still in existence in 1985. Gunn's view, by contrast, would run counter to this purpose, at least to a significant extent. Under his approach, if any drainage has taken place before December 23, 1985, making it possible to produce agricultural commodities to any significant extent, the property becomes exempt altogether, no matter what further

improvements might occur. As Gunn recognizes, under this approach, "it does not matter if the production [made possible by the earlier drainage] is merely 20% possible or 99% possible." Reply Brief for Appellant 12. The land, once any improvement whatever has occurred before 1985, becomes permanently exempt from the statute. We do not think that this interpretation furthers Congress's general purpose, nor do we think that it is the only one possible under the statutory language. We therefore defer to the interpretation of the Department of Agriculture. Gunn does not contest the fact that the land continued to have significant wetland characteristics before the 1992 work. Part of the purpose of Congress was to preserve these characteristics.

Next, Gun argues that the conversion comes within the outside-agent exception to the anti-conversion rules. The regulations establish a presumption that conversions undertaken by a drainage district, in whose jurisdiction a farmer resides and which has assessed the farmer for part of the costs of the activity, are attributed to the farmer, unless he can show that the conversion was caused by an unassociated third person and that he is not using the land for agricultural production. See 7 C.F.R. Section 12.5(b)(1)(iv)(D). Gunn contends that the drainage district's ditch-digging should not, as a matter of law, be attributed to him, and therefore that his land should not be deemed converted. But Gunn has not met the burden placed upon

him by the regulations, and nothing in the statute exempts a farmer from the provisions of the Act eimply because that land is converted by a drainage district.[4] We have found no evidence in the record to support Gunn's argument that attribution to him of the district's activities was erroneous. In fact, Gunn joined with other landowners in the petition to have the improvements made. J. App. 108. Therefore, he can be held

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[4] Gunn contends that the regulations are inconsistent with a subsequently enacted (1990) provision, 16 U.S.C. Section 3824, which provides that croplands that have been turned into wetland by "the actions of an unrelated person or public entity, outside the control of, and without the prior approval of, the landowner . . . shall not be considered to be wetland." That provision does not apply to Gunn's situation. Section 3824 allows a farmer whose cropland is turned into wetland to return that land to cropland without converting it within the meaning of the statute. We do not see how this statute is applicable to the case at hand, as Gunn does not contend that his land was turned into wetland by the drainage district. He contends the opposite: that his wetlands were turned into cropland. In addition, the drainage district is not "unrelated" to Gunn. His land is included within it, and he was one of the landowners who applied for the 1992 ditching.

responsible for the conversion of wetlands that the improved drainage was found to have caused, and he is not entitled to the exemption in the regulation.[5]

B.

Gunn also argues that the SCS failed to follow its own regulations in determining that the acreage in question was "wetland." He cites 7 C.F.R. Section 12.33(b). The portion of the regulation on which Gunn relies reads as follows:

> Maintenance or improvement of . . . converted wetlands for the production of agricultural commodities are not subject to this rule so long as such actions do not bring additional wetland into the production of an agricultural commodity. Additional wetland means any natural wetland or any converted wetland that has reverted to wetland as the result of abandonment of crop production.

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[5] We have received a brief amicus curiae from the Iowa Drainage District Association in support of Gunn's position. We have considered it to the extent it supports arguments advanced by Gunn on appeal. We have no reason to consider the artuments it advances that were not raised by Gunn himself. Knetsch v. United States, 364 U.S. 361, 370 (1960).

We do not believe that the quoted language helps Gunn's case. His property, for reasons we have given earlier in this opinion, never became "converted wetland," because it retained continuously from 1906 until at least 1992 wetland characteristics. The property was thus properly classified as "farmed wetland," rather than "prior converted wetland." The quoted portion of the regulation comes into play only if "converted wetlands" are involved.

We add that the concluding sentence of the regulation appears to lend further support to the SCS position in this case. This sentence reads as follows, in pertinent part:

> Furthermore, the maintenance of any alteration or manipulation that affects the reach or flow of water made to a wetland that was cropped before December 23, 1985, would not cause a person to be determined to be ineligible under this part, provided that the maintenance does not exceed the scope and effect of the original alteration or manipulation, as determined by SCS . . ..

We think this language fits Gunn's situation. His property is wetland that was cropped before December 23, 1985. The work undertaken in 1992 definitely did exceed the scope and effect of the original manipulation. Accordingly, SCS acted consistently with its own regulations in determining that the 28.2

acres in question were wetlands, on which Gunn could not farm by mechanical means without losing his eligibility for federal farm benefits.

III.

Both parties now agree that the District Court was without jurisdiction to entertain Gunn's claim for just compensation under the Fifth Amendment, because Gunn requested damages in excess of $10,000.00. See 28 U.S.C. Sections 1491 & 1346(a)(2), the Little Tucker Act. Gunn argues on appeal, however, that the District Court should have transferred this claim to the United States Court of Federal Claims. Such a transfer is authorized by 28 U.S.C. Section 1631 if the interests of justice warrant it and the court to which the case istransferred would have jurisdiction. Another statute, 28 U.S.C. Section 1500, provides that the Court of Federal Claims has no jurisdiction over a claim for which, or in respect of which, a case pending in another court. The Federal Circuit has interpreted this provision to bar the Court of Federal Claims' jurisdiction over a claim only when another claijm based on the same operative facts and seeking the same type of relief is pending in a different court. See Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1551 (Fed. Cir. 1994)(en banc). The two claims in Loveladies were a challenge to the government's denial of a wetlands-use permit under the Administrative Procedure Act and a takings claim based on that denial. The

court held the two claims sought different types of relief. Id. at 1551-52. Gunn's two claims are similar. We think the Court of Federal Claims would have jurisdiction over the takings claim if it were transferred.

Gunn also must show that the interests of justice require transfer of his claim, a decision that lies within the discretion of the trial court. Section 1631 was enacted so that parties confused about which court has subject-matter jurisdiction would not lose an opportunity to present the merits of a claim by filing in the wrong court and the statute of limitations would have run before he could refile properly. See In re Apex Oil Co., 884 F.2d 343, 346 (8th Cir. 1989); Hempstead County & Nevada County Project v. United States E.P.A., 700 F.2d 459, 463 (8th Cir. 1983). Gunn has not shown that either of those circumstances exists here. So far as we can tell from the record now before us, Gunn is free at any time to file his takings claim in a separate action before the Court of Federal Claims.

An additional word should be added to clarify the situation in the event of further proceedings on count II in the Court of Federal Claims. The District Court's opinion, slip op. 7, states that "Gunn has not shown that he is entitled to compensation under an inverse condemnation theory." This statement appears in the opinion after the Court had already held that it lacked jurisdiction of count II, which is the

count containing the inverse-condemnation theory. We take this statement to be dictum. The District Court had no jurisdiction to pass on the merits of the inverse-condemnation theory, and if this theory, either in a separate action or otherwise, should later be asserted before the Court of Federal Claims, we do not believe the District Court's statement should be taken to preclude whatever rights Gunn may have. In that event, in other words, it would be up to the Court of Federal Claims to decide themerits of Gunn's inverse-condemnation theory.

On this understanding, the judgment of the District Court is

Affirmed.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CHARLES GUNN,	)	No. 4-95-CV-80373
Plaintiff,	)	
vs.	)	
UNITED STATES DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICE,	)	
Defendants.	)	ORDER

In this action, plaintiff, Charles Gunn seeks judicial review of the United States Department of Agriculture, Natural Resources Conservation Service ("USDA") classification of a portion of his Greene County farm as a converted wetland. This court has jurisdiction to review agency action under the Administrative Procedure Act. 5 U.S.C. Section 702.

On March 12, 1996, the court held a hearing on the issues framed by the pleadings, the briefs, and the partis' proposed final decisions. The court commends counsel for their thorough presentation of the parties' positions. I regret I have been unable until now to review completely the large administrative record and to study

carefully the cited legal authorities.

The court concludes that the plaintiff is not entitled to the relief he seeks. The plaintiff's complaint is dismissed with prejudice, with costs taxed to the plaintiff.

In 1985, Congress enacted a statutory scheme, commonly known as Swampbuster, to protect and preserve America's wetlands. 16 U.S.C. Sections 3821-3824. Under Swampbuster, farmers who produce agricultural commodities on land delineated as wetlands by the Secretary of Agriculture are ineligible for certain farm programs. An important exception to this rule, however, allows a farmer to convert and utilize wetlands for agricultural production without losing farm program eligibility if the farmer commenced the conversion before December 23, 1985. This exception is at issue in this case.

Gunn is a farmer in Greene County, Iowa. In 1906, the Greene County Drainage District No. 5 ("the District") installed a 28-inch diameter tile main through the land in dispute in order to utilize it for crop production. Gunn and his predecessors farmed the land or placed it in set aside programs in the subsequent years. Despite the drainage, the nature of the land prevented Gunn from farming it in wet years. In 1991, the USDA classified a portion of Gunn's

land as a farmed wetland[1] Gunn appealed this classification to the District Conservationist and the Area Conservationist, but each upheld the original determination. Gunn did not appeal further to the State Conservationist.

In 1992, the District replaced the old 28-inch diameter tile main with an open ditch. In a subsequent analysis of the Gunn property, the USDA reclassified portions of the property as a converted wetland. The engineer who performed the analysis considered the drainage

---

[1] A "converted wetland" is a "wetland that has been drained, dredged, filled, leveled or otherwise manipulated . . . for thepurpose or to have the effect of making the production of an agricultural commodity possible . . ." 16 U.S.C. Section 3801(a)(4)(A). A converted wetland may not be farmed without losing certain farm subsidies.

A "farmed wetland" is land that, while farmed, continues to exhibit wetland characteristics. This land may only be farmed as it existed prior to December 23, 1985; no new drainage may be constructed on it.

In contract, a "prior converted wetland" has been so completely converted to crop land that it is not subject to regulation; in essence, it is exempt from the Swampbuster provisioins and may be farmed as if it were not a wetland.

activities of the District and concluded that the tile main did not provide sufficient additional drainage to warrant classifying it as a prior converted wetland. In total, the USDA has classified 4.5 acres of Gunn's farm as farmed wetlands and 28.2 acres as converted wetlands. The practical effect of the USDA classification is that Gunn would be ineligible for several federal farm programs if he plants crops on the affected areas or harvests pasture or hay from the land by mechanical means. Gunn appealed this determination to the Chief of the Soil Conservation Service in Washington D.C., the final level of administrative appeal. In 1994, the Chief affirmed the prior classification. Gunn then filed this federal lawsuit.

I. Supplementation of Agency Record. To aid the court's review of the agency action, the plaintiff moves to supplement the agency record with USDA Manuals and an affidavit by Charles Gunn. A court should limit its review of agency action to the administrative record unless the moving party can show that the record does not provide an adequate basis for judicial review. Independent Meat Packer's Ass'n v. Buntz, 526 F.2d 228, 239 (8th Cir. 1975). Here, Gunn's affidavit quantifies his losses due to the USDA determination that portions of his land are converted wetlands. The USDA manuals articulate the criteria that the agency uses in making wetland determinations. These documents have been received in evidence and carefully reviewed. They are not entitled to great

weight, however, because they are not materially in conflict with the stipulated facts and the materials in the administrative record on which the USDA relied in reaching its final decision.

The plaintiff's motion to supplement the agency record is granted, and the USDA's motion to strike is denied.

II. USDA Construction of the Swampbuster Act. Gunn primarily alleges that the USDA did not follow congressional intent in construing the Swampbuster Act. In particular, Gunn disputes the USDA's construction of the word "commenced" in the provision exempting converted wetland when conversion is commenced before December 23, 1985. 7 C.F.R. Section 12.5(b)(5) (construing 16 U.S.C. Section 3822(b)(1)(A)). The USDA regulations require that a person have started conversion of a wetland or obligated funds for conversion before December 23, 1985, in order for the lands to be exempt from Swampbuster. Id. Under the USDA interpretation, a person who begins conversion of wetland will be allowed to complete it. In contrast, Gunn argues that any conversion activity that is commenced before the deadline date prospectively exempts the affected lands from the Act.

In the face of Congressional silence or ambiguity, courts will defer to an administrative agency's reasonable construction of a statute. Chevron U.S.A. v. Natural Resources Defense

Council, 467 U.S. 837, 843-44 (1984). in the Swampbuster Act, Congress has not clearly defined when conversion activity has commenced. Under these circumstances, the USDA has reasonably construed the statutory uncertainty to achieve the goals of wetland conservation without imposing undue economic hardship on individuals who have actually commenced conversion before December 23, 1985, and actively pursued it. Therefore, the court upholds the agency's construction of the Swampbuster Act.

III. Is Gunn's Land a Converted Wetland? Gunn secondarily contends that, even if the USDA construction of the statute is reasonable, the USDA acted arbitrarily and capriciously in determining that his farmland is a converted wetland. A court will uphold an administrative agency decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. Section 706(2)(a). If the agency has properly considered the relevant evidence and arrived at a rational conclusion, the court will defer to agency expertise. See Citizens to Protect Overton Park v. Volpe, 401 U.S. 402, 416 (1974); Nat'l Wildlife Fed'n v. Whistler, 27 F.3d 1341, 1344 (8th Cir. 1994).

The USDA did not act arbitrarily in rejecting Gunn's claim that current drainage activities are merely a continuation of a conversion commenced in 1906 by the District. The conversion from wetland to farmland of the lands in

question did not begin before 1985. Further, the conversion was not directly linked to previous plans and activities aimed at draining the land. Earlier projects were separate and distinct in scope and effect from the 1992 effort to use a new main ditch to drain the land. Evidence in the administrative record supports the findings of fact on which the agency based its final decision. As in Von Eye v. United States, No. 95-3034, 1996 WL 447739 (8th Cir. Aug. 9, 1996), the USDA considered relevant evidence, properly construed the governing statutes, 16 U.S.C. Section 3822(b), and regulations, 7 C.F.R. Section 12.5(b), and arrived at a rational result.

The court upholds the USDA determination that Gunn's lands in question are converted wetlands.

IV. Jurisdiction of the District Court. Gunn argues in the alternative that the federal government has taken his property without just compensation. Before the court will consider this claim, it must have jurisdiction to do so. Under the Tucker Act, the United States Claims Court has exclusive jurisdiction over monetary claims against the federal government that exceed $10,000.00 in value. 28 U.S.C. Sections 1346, 1491. A "taking" claim under the Fifth Amendment is a monetary claim that falls within the Tucket Act. See Ritter v. Army Corps. of Engineers, 874 F.2d 1236, 1243 (8th Cir. 1989) ("Under the Tucker Act, district court jurisdiction over inverse condemnation claims is

limited to $10,000 or less."); Minnesota by Noot v. Heckler, 718 F.2d 852, 857-58 (8th Cir. 1983). In Count II, Gunn's taking claim seeks monetary damages that exceed the jurisdictional amount. See Pl.'s Reply Mem. at 6. Therefore, the court grants the USDA's motion to dismiss Count II of the amended complaint for want of jurisdiction.

The court has considered transferring Count II to the Claims Court, but Gunn has not shown that he is entitled to compensation under an inverse condemnation theory.

V. The Inverse Condemnation Claim.

Regulatory action may constitute a taking requiring the government to pay fair compensation if it either physically invades the property of a private citizen or regulates the property in a way that eliminates all economically beneficial and productive uses of the property. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 91992). Here, however, the government has not physically invaded Gunn's property nor eliminated all economically beneficial uses of part or all of the property. The USDA action merely renders Gunn ineligible for certain benefits under several federal farm programs if he farms the converted wetlands. This action is not a taking requiring that plaintiff be compensated under an inverse condemnation theory.

The clerk of court shall enter judgment dismissing plaintiff's complaint, with costs assessed to the plaintiff.

IT IS SO ORDERED.

Dated this 17th day of September, 1996.

/Charles R. Wolle/
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CHARLES GUNN, Plaintiff, vs. UNITED STATES DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICES, Defendants.	Case No. 4-95-CV-80373 AFFIDAVIT OF CHARLES GUNN

STATE OF IOWA)
) ss.
COUNTY OF GREENE)

I, Charles Gunn, being first duly sworn depose and state as follows:

1. I am the Plaintiff in the above-entitled matter.

2. The statements and allegations made herein are based on my own personal knowledge, information and beliefs.

3. After the above-captioned court affirmed the USDA's classification of my farmland, I appealed the decision to the Eighth Circuit Court of Appeals. The

Eighth Circuit issued its ruling on July 7, 1997, affirming the District Court. When I read the Decision, it became obvious that the appeals court misunderstood an important factual basis of my case. The appeals court claimed that I did not contest a finding that my farmland had significant wetland characteristics before the Drainage District work of 1992. That is not true. It has always been my position that, because of the drainage work done in 1906, my farm does not contain significant wetland characteristics.

4. Additionally, the USDA, previous to the 1991 classification was of the same opinion. In reviewing the administrative file filed with the above-captioned court, I noted that it did not contain a June 13, 1987 classification by the USDA finding "no wetlands" on my farm. I went to the Greene County, Iowa, local office and obtained a copy of the two page document. The document is attached as Exhibit "1".

5. Further Affiant sayeth naught.

/Charles Gunn/
Charles Gunn, Plaintiff

Subscribed and sworn to before me by the Plaintiff above, Charles Gunn, this 19th day of August, 1997.

/Janis A. Hamilton/
Notary Public--State of Iowa

HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION

. . . .

4. . . . Tract No. T1385

. . . .

SECTION II-WETLAND

12. . . . . Tract No. 1385 None.

. . . .

Date 6/13/87

Exhibit "1"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CHARLES GUNN,	)	Case No. 4-95-CV-80373
Plaintiff,	)	
vs.	)	
UNITED STATES DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICES,	)	
Defendants.	)	AFFIDAVIT OF CHARLES GUNN

STATE OF IOWA)
) ss.
GREENE COUNTY)

I, Charles Gunn, being first duly sworn depose and state as follows:

1. I am the Plaintiff in the above-entitled matter.

2. The statements and allegations made herein are based on my own personal knowledge, information, and belief.

3. I and other family members are the owners of farmland which is the subject of this litigation.

4. I am the third generation of my

family to farm the entire 160 acres affected by the Defendant's actions.

5. I have personally farmed said 160 acres since 1979 and have planted the farm in row crop production every year since that date.

6. I am the only farmer in Greene County Drainage District #5, containing approximately 4000 acres, to be adversely affected by the two and a half mile open ditch which was constructed in 1992. My neighbors have real estate containing similar soil types and existing drainage tyle systems, yet they were not deemed to have "converted wetlands".

7. In 1906, a 28-inch tile main, with several laterals, were installed in our property. When the open ditch was constructed in 1992, three additional "groups" of laterals were discovered. I feel even more laterals (running parallel) are contained in the property, however, I do not have tile records prior to the 1950's to prove their existence.

8. I feel the farm inspection (on site) after the ditch construction by the NRCS in 1993 is unfair to my case since it was the wettest year in recorded history and the NRCS did not take this into consideration.

9. I feel the entire 160 acres should be classified as "prior converted" wetland since it meets all the criteria of such and has been classified as cropland and planted to agricultural

commodities for as long as the government has kept records.

10. Beginning in 1993, the Defendant precluded me from farming portions of our land. In 1993, I could not farm 10.8 acres; in 1994, I could not farm 17.4 acres; in 1995 (and presumably for all years until the agency's actions are reversed), I cannot row crop 28.2 acres.

11. In effect, the Defendant's action "denies all economically beneficial or productive use" of the property that I cannot farm.

12. My primary concern in Count I is to get the Defendant's action reversed and the proper designation of my farmland so that I can again farm the 160 acres as I did prior to 1991. For the years my farming has been interrupted, I only seek compensation for what was lost due to the agency's conduct. I do not seek full compensation for the actual value of the unused acres for each year. In this regard, I estimate my loss for 1993 to be $1,080, 1994: $1,740; 1995: $2,820; ($2,820 for each year until the Court rules), for attorney fees, interest as provided by law, and the cost of this action.

13. In the alternative, if the Court should determine that the agency's actions are correct and lawful, then, as to Count II, I do request full compensation for the fair market value of the appropriate number of acres which

were taken, including the diminished value of the remaining 160 acres, for attorney fees, interest as provided by law, and the cost of this action.

14. I have personal knowledge of a 160 acre farm, located two miles from our land, which sold for $2,400 per acre, approximately two months ago.

15. In my opinion, the remaining land in our west 80 acres is substantially devalued due to the "converted wetland" designation and its extremely irregular cropping pattern, as mapped by the NRCS. I feel the remaining acres are worth no more than 50% of fair market value.

/Charles Gunn/
Charles Gunn, Plaintiff

Subscribed and sworn to before me by Charles Gunn on this 30th day of January, 1996.

/Janis A. Hamilton/
Notary Public In And For
The State Of Iowa

cc: Gary Hayward
Assistant U.S. Attorney
United States Courthouse Annex
2nd Floor, 110 East Court Avenue
Des Moines, Iowa 50309

HIGHLY ERODIBLE LAND AND WETLAND
CONSERVATION DETERMINATION

. . . .

5. . . . Tract No. T1385

. . . .

SECTION II-WETLAND

12. . . . . Farmed Wetlands(W). 32.9 total wetland acres.

. . . .

23. Date 4/26/1991

App. 38

HIGHLY ERODIBLE LAND AND WETLAND
CONSERVATION DETERMINATION

. . . .

5. . . . . Tract No. T1385

. . . .

SECTION II-WETLAND

12. . . . . Farmed Wetlands(W). 18.7 total wetland acres.

. . . .

22. Converted wetland. . . .drainage district action. 14.2 acres

. . . .

31. Date 11/13/92

App. 39

HIGHLY ERODIBLE LAND AND WETLAND
CONSERVATION DETERMINATION

. . . .

5. . . . . Tract No. T1385

. . . .

SECTION II-WETLAND

12. . . . . Farmed Wetlands(W). 16.8 total wetland acres.

. . . .

22. Converted wetland. . . .drainage district action. 10.8 acres

. . . .

31. Date 5/10/93

App. 40

HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION

. . . .

5. . . . . Tract No. T1385

. . . .

SECTION II-WETLAND

12. . . . . Farmed Wetlands(W). 4.5 total wetland acres.

. . . .

22. Converted wetland. . . .drainage district action. 28.2 acres

. . . .

31. Date 10/31/94

STATUTORY AND REGULATORY PROVISIONS

The statute defining what land is exempt from the "swampbuster" provisions of the Food Security Act of 1985[2], 16 U.S.C. Section 3801(a)(4)(A) reads in pertinent part as follows:

> "The term 'converted wetland' means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if--
>
> (i) such production would not have been possible but for such action; and
>
> (ii) before such action--
>
> (I) such land was wetland; . . . ."

---

[2] Food Security Act of 1985, Public Law No. 99-198, 99 Stat. 1354. Its provisions are codified at 16 U.S.C. Sections 3801 through 3849. Swampbuster provisions are codified at 16 U.S.C. Sections 3821-3823.

The statute describing what land is covered by the "swampbuster" provisions of the Food Security Act of 1985, 16 U.S.C. Section 3801(a)(18), reads in pertinent part as follows:

> "The term 'wetland', except when such term is part of the term 'converted wetland' means land that--
>
> (A) Has a predominence of hydric soil;
>
> (B) Is is inunindated or saturated by surface or ground water at a frequency and duration sufficient to support a prevelance of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
>
> (C) Under normal circumstances does support a prevelance of such vegetation."

The statute making production of an agricultural commodity on wetland converted after December 23, 1985 ileligible for USDA programs, 16 U.S.C. Section 3821(a), reads in pertinent part as follows:

> "Except as provided in Section 3822 and notwithstanding any other provision of law, following the date of enactment of this Act [December 23, 1985], any person who in any crop year produces as agricultural commodity on vonverted wetland should be ineligible for -- ****"

The statute exempting "converted wetland" from the "swampbuster" provisions of the Food Security Act of 1985, 16 U.S.C. Section 3822(b)(1)(A) reads in pertinent part as follows:

> "No person shall become ineligible under section 3821 for program loans, payments, and benefits: (1) As the result of the production of a crop of an agricultural commodity on: (A) converted wetland if the conversion of such wetland was commenced before December 23, 1985."

The agency regulation meant to implement the statute's exemption of"converted wetland", Paragraph 7 C.F.R. Section 12.5(d) reads in pertinent part as follows:

> "Exemptions for converted wetland. (1) A person shall not be determined to be ineligible for program benefits in accordance with Section 12.4 as the result of the production of a crop of an agricultural commodity on:
>
> (i) Converted wetland if the conversion of such wetland was commenced before December 23, 1985;"

The agency regulation meant to implement Congress' definition of "converted wetland", Paragraph 7 C.F.R. Section 12.2(a)(6) reads in pertinent part as follows:

> "Converted wetland means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) that makes possible the production of an agricultural commodity without further application of the manipulations described herein if (i) such production would not have been possible but for such action; and (ii), before such action such land was wetland and was neither highly erodible land nor highly erodible cropland."

The agency regulation meant to assist in the identification of "converted wetland", Paragraph 7 C.F.R. Section 12.32, in pertinent part, reads in pertinent part as follows:

> "Converted wetland identification criteria. (a) Converted wetland shall be identified by determining whether the wetland was altered so as to meet the definition of converted wetland set forth in Section 12.2(a)(6). In making this determination, the following factors are to be considered:
>
> . . . .
>
> (b) A wetland shall not be considered to be converted if:
>
> . . . .
>
> (2) It is determined that the actions of the person producing such agricultural commodity does not permanently alter or destroy natural wetland characteristics."

(2)

Supreme Court, U.S.
FILED
JAN 5 1998
CLERK

No. 97-959

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CHARLES GUNN,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
NATURAL RESOURCES CONSERVATION SERVICES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF AMICI CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND THE IOWA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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IN THE

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BRIEF AMICI CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND THE IOWA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

With the written consent of all the parties given and filed with the Clerk of the Court, The American Farm Bureau Federation and the Iowa Farm Bureau Federation respectfully submit this brief as amici curiae.[1]

Amici American Farm Bureau Federation and the Iowa Farm Bureau Federation pray that a Writ of Certiorari

---

[1] Counsel for amici curiae have authored this brief in whole and no other person or entity other than amici, their members or counsel have made a monetary contribution to the preparation or submission of the brief.

be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

INTEREST OF AMICI

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Act of the State of Illinois, AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in 50 states and Puerto Rico representing more than 4.8 million member families. AFBF farm and ranch members produce virtually every kind of agricultural commodity produced commercially in the United States. The Iowa Farm Bureau Federation is a member organization of AFBF and represents the interests of farmers in the State of Iowa.

Amici (hereinafter referred to as "Farm Bureau") have a direct interest in the outcome of this case. Farm Bureau farm and ranch members own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food and fibre and other basic necessities. Amici's members' continued productive and profitable use of their lands is severely restricted by the court of appeals' crabbed interpretation and application of the exemption provisions of the so-called "swampbuster" provisions of the Food Security Act. The Eighth Circuit's construction of swampbuster allows the recapture of long since converted wetlands, which is contrary to the intent of Congress in the enactment of swampbuster as a means for the protection and preservation of those wetlands that remained in their unaltered state.

Although the court of appeals' decision will have nationwide impact. Farm Bureau notes that it is of special and immediate concern to farmers in midwestern states such as Iowa where there has been widespread drainage and conversion of wetlands in order to create productive

and profitable farms. Going back as far as the Federal Swamplands Act of 1849, millions of acres of midwestern wetlands have been transferred into private ownership for the express purpose of conversion to croplands, which was usually accomplished with the technical and financial assistance of the federal government. The Eighth Circuit's misconstruction of the prior converted exemption provisions of swampbuster jeopardizes the continued economic viability of midwestern farmers in the productive use of their land.

Farm Bureau urges this Court to grant certiorari to correct the court of appeals' unjustified narrowing of the legislative exemption for prior converted wetlands from swampbuster which was expressly intended to protect farmers and ranchers in their continued use of their lands without fear about permissible conduct and exposure to substantial penalties for pursuing farming and ranching activities.

STATEMENT OF THE CASE

Petitioner, Gunn, and his predecessors in interest, have owned and farmed 160 acres of land in Iowa since 1906. Prior to 1906, the land was predominantly wetland and unsuitable for farming. In 1906, the local drainage district installed a main drainage tile with two laterals that drained Gunn's land leaving none of it in a wetland state. All of the Gunn land has been productivelv farmed on a continuous basis since 1906.

Subsequent to 1906, additional laterals were added to Gunn's land. Additional laterals allowed water from adjacent lands to drain across Gunn's land. In time, the original main drainage tile proved inadequate to handle all drainage into it so that Gunn's lands were occasionally left wet and untillable. To correct this problem, the drainage district replaced the 1906 main drainage tile in 1992 with an open ditch that was able to handle all drainage water coming from Both Gunn's and adjacent lands.

The National Resource Conservation Service (NRCS) thereafter advised Gunn that the installation of the open ditch resulted in the conversion of a number of acres of wetlands and that, if farmed, Gunn would be in violation of the swampbuster provisions of the Food Security Act of 1985 and forever barred from receiving any further federal farm program benefits. Gunn unsuccessfully pursued administrative appeals on the ground, among others, that the lands in question were prior converted since their original drainage in 1906 and thus exempt from the provisions of swampbuster. NRSC ruled that, under its interpretation of swampbuster and its regulations thereunder, to be exempt prior converted wetlands, the conversion must be complete and permanent for all time; while existing drainage facilities may be maintained, they may not be improved upon regardless of change in circumstances.

Gunn then filed this action seeking declaratory judgment contending that the NRSC's regulations and application thereof were neither consistent with nor a reasonable interpretation of swampbuster and the exemptions therefrom. Both the district court and the Eighth Circuit upheld the NRSC regulations and their application in this case. Gunn then filed with this Court for a writ of certiorari.

REASON FOR GRANTING THE WRIT

THE CIRCUIT COURT ERRED IN UPHOLDING USDA REGULATIONS THAT GO BEYOND THE CLEARLY EXPRESSED INTENT AND LANGUAGE OF SWAMPBUSTER AND ALLOW THE RECAPTURE OF PRIOR CONVERTED WETLANDS.

Agency action that violates Congressional intent is not entitled to deference. *Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 105 S.Ct. 1102, 1107-8, 84 L.Ed.2d 90 (1985). Agency action that violates clear Congressional intent must be rejected by the reviewing court. *Chevron E.S.A.*,

Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). Accordingly, this Court must review the USDA swampbuster regulations in light of the language and legislative history of the Food Security Act of 1985.

In enacting the Food Security Act of 1985, Congress included the companion conservation measures of "sodbuster" and "swampbuster."[2] Sodbuster was intended to slow the conversion of fragile, highly erodible lands to cultivation. Swampbuster was intended to slow the conversion of some 99 million acres of wetlands that were estimated to remain in the United States, particularly some 5.2 million acres that the 1982 SCS National Resources Inventory estimated to have high or medium potential for conversion to cultivation.[3]

Sodbuster and swampbuster prohibit farmers who convert highly erodible lands and wetlands into cropland after December 23, 1985, from participating in and receiving benefits from most federal farm programs. See 16 U.S.C. Sections 3821-3823. Sodbuster and swampbuster did not make it illegal to convert highly erodible lands and wetlands to agricultural use, but it established financial disincentives so strong that most farmers had little choice but to comply. See 16 U.S.C. Section 3821(1) and 7 C.F.R. Section 12.4(c).

In both the case of sodbuster and swampbuster, Congress recognized that prior converted highly erodible lands and wetlands would not be restored and certain exemptions were required for reasonable and fair implementa-

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[2] Food Security Act of 1985, P.L. 99-198, 99 Stat. 1354, codified at 16 U.S.C. Sections 3801 *et seq.* Sodbuster provisions are codified at 16 U.S.C. Sections 3811-3814. Swampbuster provisions are codified at 16 U.S.C. Sections 3821-3823.

[3] H.R. Report No. 99-271, Part 1, 99th Cong. 1st Sess., *reprinted in* 1985 U.S. Code Cong. & Ad. News 1103, at 1188 and 1190.

tion of the program.[4] Thus, in the case of swampbuster, Congress exempted prior converted wetlands. Section 3822(b)(a) of Title 16 provides, in relevant part, that "[n]o person shall become ineligible . . . for program loans or payments . . . [a]s the result of the production of an agricultural commodity on . . . [a] converted wetland if the conversion of the wetland was commenced before December 23, 1985."

The clealy stated Congressional intent and clear language of the statute provide that prior converted wetland exemption was intended to fit lands like that of Gunn's, which were tiled, drained and brought into agricultural production in 1906. And once so converted, such lands were to be forever exempt from the provisions of swampbuster whatever may happen to them in the future. Gunn's 160 acres of land were no longer included within the remaining unconverted 99 million acres of wetlands Congress said in 1985 it intented to protect with swampbuster. Having been tiled, drained and brought into agricultural production in 1906, Gunn's 160 acres were clearly the type of prior converted wetlands that Congress recognized would not be restored to wetlands status and were required to be exempted for a reasonable and fair implementation of the swampbuster program.

USDA's swampbuster regulations state that a wetland will not be considered converted if "it is determined that the actions of the persons producing such agricultural commodity does not *permanently* alter or destroy natural wetland characteristic." (Emphasis added.) 7 C.F.R. Section 12.32. The USDA regulations deny converted wetland status unless the draining permanently altered or destroyed the natural wetland characteristics for all time. The USDA regulations effectively prohibit any improvement of drainage facilities in order to maintain converted wetland status after December 23, 1985 regardless of any change in circumstance affecting the land.

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[4] *Ibid.* at 1189 and 1192.

USDA swampbuster regulations go beyond the clear intent of Congress to only protect those wetlands that remained in an unaltered state in 1985. The USDA regulations go beyond Congress' recognition that those wetlands that had been previously converted to agricultural uses would not be restored to wetland status. The USDA regulations effectively erect a barrier against meeting any change in drainage circumstances and requirements that occur after December 23, 1985 by allowing only the maintenance of facilities that existed on that date, but no improvement of any kind, nature or degree thereafter.

Contrary to Congressional intent, the USDA swampbuster regulations effectively provide the means for the recapture and restoration of prior converted wetlands. The regulations effectively negate the prior converted wetland exemption that Congress clearly and unequivocally granted farmers like Gunn whose land was drained and continuously farmed since 1906.

The Eighth Circuit's ruling upholding the USDA's swampbuster regulations cannot survive the scrutiny of *Chemical Manufacturers* and *Chevron*. Farm Bureau urges this Court to grant certiorari in this case to correct the error and restore the prior converted wetland exemption as it was intended by Congress.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 97-959

In the

Supreme Court of the United States

October Term, 1997

CHARLES GUNN,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES CONSERVATION SERVICE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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22 pp

QUESTION PRESENTED

BACKGROUND

The "Swampbuster" provision of the Food Security Act of 1985 provides, "[n]o person shall become ineligible ... for program loans or payments ... [a]s the result of the production of an agricultural commodity on ... [a] converted wetland if the conversion of the wetland was commenced before December 23, 1985." 16 U.S.C. § 3822(b)(1)(A).

Under Section 3801(a)(6)(A), a "converted wetland" is a wetland that is "manipulated ... for the purpose or to have the effect of making the production of an agricultural commodity possible."

QUESTION

Is *Chevron* deference due an agency regulation implementing a statute where the agency regulation conflicts with the clear and unambiguous language of the statute and the regulation redefines the regulatory program, such as in this case where the agency held a person who commenced the farming of a wetland on his property for agricultural commodities in 1906 was not eligible for farm program loans and payments because the wetland had not lost *all* its wetland characteristics, and became a "converted wetland," until 1992?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the petition for writ of certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Stuart, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

In its fight to protect fundamental constitutional rights, PLF becomes involved in cases that raise important public policy considerations and that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the Court in resolving the underlying legal issues. PLF supports a broad view of the public interest and promotes balance and common sense in the adoption, interpretation, and administration of laws and regulations.

There is a growing trend among federal agencies to expand their jurisdiction incrementally by adopting regulatory

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

interpretations that go beyond the plain meaning and intent of their authorizing statutes. Under the Clean Water Act, for example, the Army Corps of Engineers asserted jurisdiction over puddle-sized seasonal wetlands (as "navigable waters of the United States") long before the Act even mentioned wetlands. In this case, the United States Department of Agriculture is extending its regulatory reach to include wetlands that have been expressly exempted from certain farming limitations by the "Swampbuster" provision of the Food Security Act of 1985. Executive branch agencies must be limited to the scope of authority delegated by Congress.

PLF has participated in numerous cases involving the interpretation of federal environmental laws. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). PLF also participated as amicus curiae in this Court in the *Steel Company v. Citizens for a Better Environment*, U.S. Supreme Court No. 96-643 (pending); *Bennett v. Spear*, 117 S. Ct. 1154 (1997); *Douglas County, Oregon v. Babbitt*, 116 S. Ct. 698 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

PLF's public policy perspective and litigation experience in support of rational environmental protection and economic rights will provide a necessary viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

Charles Gunn owns 160 acres of land in Iowa. At one time, this acreage was wetlands and not suitable for farming. However, in 1906 the local drainage district installed a system to drain all excess water from the land. Since then, Gunn and his predecessors-in-interest have farmed the land continuously.

Additions to the drainage system within the district allowed water from neighboring farmland to drain across Gunn's land (when the system exceeded capacity) so that by 1947 parts of Gunn's land were sometimes too wet to farm but dry enough at other times to farm. The district addressed this problem in 1992 by upgrading the system to again allow complete draining of Gunn's land.

In 1985, Congress passed a provision to the Food Security Act commonly known as "Swampbuster." Pub. L. No. 99-198, §§ 1201, 1221-1223, 99 Stat. 1354, 1504-08 (codified as amended at 16 U.S.C. §§ 3801, 3821-3824). This provision was intended to protect wetlands against conversion to agricultural use but "grandfathered" use of wetlands where conversion to agricultural production *commenced* before December 23, 1985. "Swampbuster" did not make it illegal to convert wetlands to agricultural use after 1985, but it did provide that any agricultural production on a "converted wetland" would cause the farmer to forfeit his eligibility for a number of federal farm-assistance programs.

To participate in these programs, a farmer must certify his eligibility to the Soil Conservation Service (SCS), now the Natural Resources Conservation Service. SCS determines whether the land for which the farmer seeks benefits contains wetlands that have been converted for agricultural purposes. Since Gunn's land had been drained and farmed since 1906, he sought certification in 1991 and was told by SCS that approximately 20% of his land was not "converted wetlands" under the Act but so-called "farmed wetlands."[2] SCS also told Gunn he could continue to use these "farmed wetlands" but that he would lose his farm benefits if he improved the drainage system. In consequence of the 1992 upgrade to the drainage

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[2] "Farmed wetlands" is a wetland classification that does not appear in "Swampbuster" but is used by SCS to refer to wetlands that are sometimes dry enough to farm.

system by the local drainage district, SCS classified 28.2 acres of Gunn's land as wetlands that had not been converted to agricultural use until 1992, after the 1985 deadline.

Gunn filed suit in district court seeking, among other things, declaratory judgment that he was entitled to farm this land without losing benefits. In reliance on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, the district court ruled that the classification of Gunn's land as post-1985 "converted wetlands" was reasonable and denied Gunn's request for declaration. Gunn appealed to the Eighth Circuit Court of Appeals claiming the government's interpretation of the terms "commenced" and "converted wetland" are inconsistent with the "Swampbuster" statute. Although the circuit court acknowledged that the words of the statute can bear the meaning Gunn contends, the court held the SCS interpretations were "sufficiently plausible to meet the *Chevron* test." *Gunn v. U.S. Department of Agriculture*, 118 F.3d 1233, 1238 (8th Cir. 1997).

SUMMARY OF ARGUMENT

Chevron deference does not lie where the intent of Congress is clear from the words of the statute, but only where a statute is silent or ambiguous. With respect to the definition of "converted wetland" under "Swampbuster," Congress was neither silent nor ambiguous but precisely defined the term. A wetland is converted when it is "manipulated ... for the purpose or to have the effect of making the production of an agricultural commodity possible." Gunn's land was manipulated by draining in 1906 and has been farmed continuously ever since.

Under "Swampbuster," farming "converted wetland" is exempted from the Act's restrictions if the conversion was commenced before December 23, 1985. Gunn's land met this statutory definition. But, in contravention of the Act, the agency "rewrote" the statutory scheme to add that the manipulation must have been so complete as to eliminate all wetland characteristics of the land.

Federal agencies should not be allowed to rewrite their legislative mandate. The agency's interpretation conflicts with the plain language of the statute and the legislative history and, therefore, should not be upheld. Approximately 75% of wetlands remaining in the lower 48 states are found on private land, primarily farmland. By one estimate, up to 60 million acres may be characterized as "converted wetland." Against this backdrop, and over concerns for the plight of farmers, Congress passed the Food Security Act of 1985 to provide "an economic climate in which efficient American family farmers can survive." The balance Congress sought between wetland protection and protection of small family farmers took the form of an exception to "Swampbuster." Congress expressly "grandfathered" wetland areas farmed prior to the 1985 deadline. The executive agency has no authority to reconsider this legislative policy determination.

Additionally, in analogous situations, other circuit courts of appeals have applied the *Chevron* test differently from the Eighth Circuit in this case. This disparate treatment under the law has significant ramifications for the economic competitiveness of our Nation's family farmers. This Court should review the Eighth Circuit judgment, in light of Fifth and District of Columbia Circuit decisions, to establish a consistent application of *Chevron*.

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE AN IMPORTANT QUESTION OF LAW RELATING TO THE GOVERNMENT'S EXPANSIVE INTERPRETATION OF THE "SWAMPBUSTER" PROVISION OF THE FOOD SECURITY ACT OF 1985

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, this Court set forth a standard for court review of an agency's construction of a statute it administers. First, is the question whether Congress has directly spoken to the precise question at issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. And second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

The issue in this case is whether Gunn commenced the conversion of wetlands on his property before December 23, 1985. Congress spoke precisely to that question in "Swampbuster" and stated it intended to "grandfather" farming operations in wetlands, like Gunn's, that had begun before the statutory deadline. 16 U.S.C. § 3822(b)(1)(A). But the court below allowed the government to sidestep the intent of Congress, and the judicial standard this Court established in *Chevron*, by endorsing the agency's redefinition of the statutory scheme for "converted wetlands." The Eighth Circuit judgment guts the protections "Swampbuster" provides our Nation's farmers—who are already pressed by mounting environmental regulatory demands—and undermines national agricultural production. Of the roughly 100 million acres of wetlands remaining in the lower 48 states, about 75% of these areas are located on private, primarily agricultural land. Michael S.

Naggy, *The Definition of "Wetlands" Under Section 404 of the Clean Water Act: Past, Present, and Future*, 3 U. Balt. J. Envtl. L. 92, 101 (1993). By one estimate, up to 60 million acres may be characterized as "converted wetland." *See* Houston Chron., Sept. 30, 1990, at 2A.

A. Congress Has Directly Spoken to the Precise Issue in This Case and the Intent of Congress Is Clear

In *Chevron*, this Court looked both to the statutory language and the legislative history to determine whether Congress addressed the issue before the Court. The statutory language in this case is clear and unambiguous.

Under Section 3822(b)(1)(A) of Title 16, "[n]o person shall become ineligible ... for program loans or payments ... [a]s the result of the production of an agricultural commodity on ... [a] converted wetland if the conversion of the wetland was commenced before December 23, 1985." Section 3801(a)(6)(A) provides:

> The term "converted wetland" means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if:
>
> (i) such production would not have been possible but for such action; and
>
> (ii) before such action—
>
> (I) such land was wetland; and
>
> (II) such land was neither highly erodible land nor highly erodible cropland.

In 1906, Gunn's land was drained or otherwise manipulated both for the purpose and with the effect of making the

production of agricultural commodities possible. This production has continued ever since. This is a matter of record which the lower court does not dispute. The Eighth Circuit even begrudgingly admits that a plain reading of the statutory language supports Gunn's claim that his property is "converted wetland" under the Act. *Gunn*, 118 F.3d at 1238. However, in putative reliance on *Chevron*, the court upholds the agency's view that "[i]f significant wetland characteristics remain, the land remains wetland and cannot be converted wetland." But this view is not supported by the statutory language. Indeed, it conflicts with the statutory language.

The definition of "converted wetland" is expressly conditioned on the manipulation of the wetland for agricultural production. It does not require or imply that the manipulation must be so complete that all wetland characteristics disappear.

To the contrary, the definition specifically includes "any activity that results in impairing or reducing the flow, circulation, or reach of water" on the wetland. This language contemplates a partial conversion of wetland features, not a total elimination of wetland characteristics. This conclusion is made clearer by two other references.

First, the Act only requires that the conversion of the wetland "was *commenced* before December 23, 1985." 16 U.S.C. § 3822(b)(1)(A) (emphasis added). The term "commenced" is not ambiguous. It is commonly understood to mean begin or start. It is not a term in need of definition and Congress offered none. And second, the legislative history demonstrates congressional intent to "grandfather" prior farmed wetland:

> Mr. Daschle offered an amendment, to deny Federal farm program benefits to persons planting agricultural commodities on converted wetlands for harvest .... Mr. Daschle noted that while the sodbuster provisions [prohibiting farming on highly erodible

> lands] would be retroactive, the swampbuster amendment would only be concerned with conversion of wetlands as of the date of enactment ....
>
> ....
>
> ... Mr. Daschle and Mr. Lewis discussed the question of cropland that has been flooded and later reclaimed. Mr. Daschle stressed that the amendment would not affect the use of this land because *if production was underway at any time in the past, the land would be grandfathered.*

H.R. Rep. No. 99-271, pt. 1, at 416, 419, 99th Cong., 1st Sess. (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1520-23 (emphasis added).

It should be clear that Congress spoke to the precise issue of when "Swampbuster" applies and that Congress intended if agricultural "production was underway at any time in the past [before December 23, 1985], the land would be grandfathered." Gunn's land was drained in 1906 and has been farmed ever since. As the Eighth Circuit correctly noted, but misunderstood: "Under the statute, conversion occurs when wetland is manipulated with a certain effect. The [agency] regulation simply underscores that it is the initial manipulation, not some subsequent applications of it, that is to be considered for this purpose." *Gunn*, 118 F.3d at 1239 n.3. Under this standard, Gunn's land qualifies as "converted wetland." The agency's contrary construction is due no deference under *Chevron*. Unlike in the Clean Air Act under review by this Court in *Chevron*, Congress left no gap in "Swampbuster" for the agency to fill. *See Morton v. Ruiz*, 415 U.S. 199, 231 (1974). "If the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 855.

B. The Agency Did Not Interpret an Ambiguous Statute; Rather, It "Rewrote" the Statutory Scheme

The Eighth Circuit went awry in this case when it gave *Chevron* deference to the agency's view that if the drainage or other manipulation has been sufficient to make crops producible, as is the case here, but the land retains wetland characteristics, the land is best described as "farmed wetland," as opposed to "converted wetland." *Gunn*, 118 F.3d at 1238. According to the agency, "farmed wetlands" can be farmed without loss of benefits only so long as the previously accomplished drainage or manipulation is not significantly improved. *Id.* But this is not a simple interpretation of the statutory language, it is an excursion and incursion into the legislative realm that amounts to nothing less than a redefinition of the statutory scheme. The agency simply did not like the all-or-nothing language of "Swampbuster," which "grandfathers" all wetlands put into agricultural production before December 23, 1985, so the agency "rewrote" the statute to further restrict land use.

"Farmed wetlands" is a term that does not appear in the statute. Rather, it is a term adopted by the agency's regulations. *Id.* Notwithstanding the lack of statutory authority for the agency's reclassification of wetlands under "Swampbuster," the Eighth Circuit erroneously concluded that this new wetland classification somehow "accords with the general purpose of the statute—to preserve those wetland characteristics still in existence in 1985." *Id.* But this misses the point. *Chevron* does not give license to the agency to set aside a specific statutory scheme defined by Congress in favor of the agency's view of the statutory purpose.

Moreover, the court cites no authority for its limited characterization of the purpose of the statute. Indeed, the statute expressly excepts wetlands put into agricultural production before enactment of the statute, demonstrating a clear economic purpose to the "grandfather" clause of the "Swampbuster" provision. In addition, the Food Security Act

of 1985 derived from a large and complex omnibus bill that was based on a congressional desire to bolster a failing agricultural economy:

> The purpose of this bill is simple. It is to provide, as far as it can be done in legislation of this kind, the basis for an economic climate in which efficient American family farmers can survive the grim squeeze that has already driven too many of them to or close to the brink of ruin.

H.R. Rep. No. 99-271, pt. 1, at 8, 99th Cong., 1st Sess. (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1520-23 (emphasis added).

The drafters felt the need for this bill was obvious to all who had followed recent developments. *Id.* They noted that even if Congress were willing to let important segments of agriculture collapse, Congress could not afford to do so because of the dangers this would pose to the entire national economy. *Id.*

It was clear to these drafters that what Congress did about new farm policy must be based on the understanding that agriculture is our Nation's largest and most basic industry. *Id.* at 1111-12. They believed America's farmers have given our people the world's best diet at costs which—in comparison to the average consumer's earnings—really constitute a farmer subsidy to the general public. *Id.* at 1112. They also believed that one of the chief reasons this country has been able to grow and make progress in many areas has been the increasing efficiency of its farmers and the other segments of agriculture. *Id.* "When agriculture is depressed, the farmer and his family suffer—but they do not suffer alone." *Id.* They noted with great concern the distress in the agricultural supply industries, and in businesses on hundreds of main streets around the Nation. *Id.* And in the long run, the drafters conclude, a

depressed and demoralized agriculture would be very bad economic news for the entire Nation. *Id.*

This legislative history demonstrates that the primary purpose of the Food Security Act of 1985 was, as the name of the Act implies, to protect the Nation's efficient supply of food by providing security to our family farmers. Congress chose to balance this effort with a conservation ethic that protects wetlands, but not at the expense of prior farming practices. Congress made a policy decision to "grandfather" prior "converted wetlands" and established a clear and unambiguous definition of this term—a definition that would be easy to meet and which would allow average farming families to anticipate the effects of their farming practices on farm program benefits. But the agency has supplanted Congress' public policy decision. Rather than accord with the general purpose of the statute, the agency's "farmed wetland" classification undermines that purpose.

When federal agencies can "rewrite" their legislative mandate and change the expectations of the regulated farming community at will, this causes unnecessary distrust of the government and demoralizes the industry. We all lose when that happens. This Court should not allow the government to rely on *Chevron* to circumvent the will of Congress to protect and promote efficient farm production for the agency's perceived "larger goal" of wetland protection.

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RECONCILE INCONSISTENT APPLICATIONS OF THE *CHEVRON* TEST AMONG THE CIRCUIT COURTS OF APPEALS

In analogous circumstances, other courts of appeals have applied *Chevron* differently from the Eighth Circuit in this case. In *National Mining Association v. Department of Interior*, 105 F.3d 691 (D.C. Cir. 1997), the District of Columbia Circuit

had to consider regulatory implementation of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1201, *et seq*.

In 1977, Congress enacted SMCRA "to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." *National Mining Association*, 105 F.3d at 693. The Office of Surface Mining Reclamation and Enforcement (OSM) administers and enforces SMCRA. Under SMCRA, no person may engage in surface coal mining without a permit. At issue was OSM's interpretation of the Act's ownership and control provision.

Section 510(c) of SMCRA is as clear as "Swampbuster" and states that when "any surface coal mining operation owned or controlled by the applicant" is currently in violation of SMCRA, the permit shall not be issued. However, just as in *Gunn*--the present case, the agency expanded the statutory limitation by adding a new regulatory category. OSM adopted a rule that the permit shall not issue if an operation owned or controlled "by either the applicant or *by any person who owns and controls the applicant*" is currently in violation of SMCRA. *National Mining Association*, 105 F.3d at 694. This broadening of the Act to cover the owners of applicants in addition to the applicants themselves is no more expansive than the agency's rule in *Gunn*. In *Gunn*, the agency adopted a rule that wetlands are "converted wetlands" not when they are manipulated for agricultural production, as "Swampbuster" explicitly states, but rather when they are manipulated to eliminate permanently all wetland characteristics.

However, contrary to the deference shown the government in *Gunn*, the D.C. Circuit in *National Mining Association* applied the first step of *Chevron* to strike down this construction of the statute. The court held that the statutory language was unmistakably clear and that "OSM is attempting to use section

510(c) to regulate those not covered by that section." *Id.* at 694-95. The same could be said for the agency's attempt in *Gunn*. The agency is trying to regulate "farmed wetlands" that are not covered by the "Swampbuster" provision.

Additionally, unlike the court in *Gunn*, the D.C. Circuit was not deterred from applying *Chevron* to void the agency regulation even though the general purpose of SMCRA was to protect the environment. *Gunn*, it seems, would have fared differently in the D.C. Circuit where the court's application of *Chevron* accords more with this Court's holding in that case. But the D.C. Circuit is not the only Circuit that takes a different view of *Chevron*.

In *Hernandez v. Reno*, 91 F.3d 776 (5th Cir. 1996), the plaintiff challenged the Immigration and Naturalization Service (INS) regulations implementing the Family Unity Provision of the Immigration Act of 1990. The Family Unity Provision of the Act provides that an alien who is an eligible immigrant as of May 5, 1988, among other things, shall be granted authorization to work in the United States. However, the INS regulations require that an alien seeking Family Unity status as the spouse or child of a legalized alien must be such not only on May 5, 1988, but continuously thereafter until permanent residency is granted.

This INS interpretation of the Immigration Act is remarkably similar to the SCS interpretation of "Swampbuster." Under "Swampbuster," "[n]o person shall become ineligible ... for program loans or payments ... [a]s the result of the production of an agricultural commodity on ... [a] converted wetland if the conversion of the wetland was commenced before December 23, 1985." However, the agency interprets this provision to mean that the farmer not only must have commenced the conversion before December 23, 1985, but also must have "actively pursued" the particular conversion until the

conversion is complete, that is until the wetland no longer demonstrates any wetland characteristics. *Gunn*, 118 F.3d at 1237.

The INS interpretation in *Hernandez* was initially upheld by the district court which relied on *Chevron* and ruled that the INS regulation interpreting the Family Unity Provision requiring the alien to maintain the same relationship throughout the pendency of his petition was a permissible construction of the statute. But the Fifth Circuit overruled the district court decision:

> Chevron deference does not lie where the intent of Congress is clear from the words of the statute, but rather where a statute is "silent or ambiguous with respect to the specific issue ...." The statute requires that Hernandez be the spouse or unmarried child of a legalized alien on May 5, 1988. It requires no more. The INS regulation adding a requirement that the alien continuously maintain that same relationship is in conflict with the plain language of the statute. Our duty is to give effect to the clear, unambiguous intent of Congress. Whether Hernandez marries after May 5, 1988 is irrelevant to the inquiry under the Family Unity Provision of the Immigration Act of 1990.

Id. at 780-81.

Similarly, the Eighth Circuit in *Gunn* ruled that the agency's interpretation of the "Swampbuster" provision was "sufficiently plausible to meet the *Chevron* test." *Gunn*, 118 F.3d at 1238. However, the intent of Congress in "Swampbuster" is clear from the words of the statute. The statute is not silent or ambiguous with respect to what constitutes a "converted wetland." The statute requires that Gunn manipulate a wetland for the purpose or with the effect of

making the production of an agricultural commodity possible before December 23, 1985, which has happened on Gunn's land since 1906. The statute requires no more. The agency regulation requiring Gunn to "actively pursue" the complete conversion of his land and reclassifying his "converted wetland" as a so-called "farmed wetland" is in conflict with the plain language of the statute. The duty of the Court is to give effect to the clear, unambiguous intent of Congress. Whether Gunn manipulated his land after December 23, 1985, is irrelevant to the inquiry under the "Swampbuster" provision of the Food Security Act of 1985.

The type of disparate treatment under the law demonstrated by these cases has significant ramifications for the economic competitiveness of our Nation's family farmers. This Court should review the Eighth Circuit decision in light of *National Mining Association* and *Hernandez* to establish a consistent application of *Chevron*.

CONCLUSION

The Eighth Circuit's judgment conflicts with the plain language of the "Swampbuster" provision of the Food Security Act of 1985. It guts the public policy decision of Congress to "grandfather" prior farming of wetlands to bolster small family farms. It also distorts the intent of *Chevron*, which requires agencies to defer to the unambiguous intent of Congress as expressed in a statute. Federal agencies should not be allowed

to co-opt the legislative function by "rewriting" the statutory scheme to achieve their own ends. For these reasons, and to address conflicting applications of *Chevron* among the circuits, this Court should grant the petition for writ of certiorari.

DATED: January, 1998.

Respectfully submitted,

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No. 97-959

In The

Supreme Court of the United States

October Term, 1997

CHARLES GUNN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICES,

Respondents.

On Petition For *Writ* Of *Certiorari*
To The United States Court Of Appeals
For The Eighth Circuit

AMICI CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AND THE IOWA DRAINAGE DISTRICT ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the "wetland" and "swampbuster" legislation's "converted wetland" criteria and corresponding "exemption" designations, as applied by the United States Department of Agriculture and the Natural Resources Conservation Service, violate the express language of the Act and frustrate the intent of Congress.

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AMICI CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AND THE IOWA DRAINAGE DISTRICT ASSOCIATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation respectfully submits this *amici curiae* brief on behalf of itself and the Iowa Drainage District Association in support of Petitioner, Charles Gunn. Pursuant to Supreme Court Rule 37.2, this *amici curiae* brief is filed with written consent of all the parties.[1]

IDENTITY AND INTEREST OF AMICI CURIAE

The Iowa Drainage District Association is a non-profit entity established in 1990. As allowed by the State of Iowa, the association was established to provide for the mutual protection and benefit of the more than 3,000 drainage districts it represents in 26 Iowa counties, including the county in which this action took place, Greene County. One of the primary functions of the association is to assist drainage districts and property owners with federal agency application of swampbuster and wetland provisions of federal law, in that Iowa drainage district laws often conflict with the swampbuster and

[1] *Amici* have obtained the written consents of the parties. The written consents have been provided to the Clerk of the Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

wetland provisions. Because the Iowa Drainage District Association was established to assist Iowa drainage districts and the corresponding property owners, it has a direct and substantial interest in the issues presented in this case.

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest, legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberty, the right to own and use property, limited government, and the free enterprise system.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amici hereby adopt Petitioner's description of the opinions below, statement of jurisdiction, and statement of the case.

SUMMARY OF ARGUMENT

When Congress specifically expressed its intent by enacting, and subsequently amending, the statutes applicable in this case, the United States Department of Agriculture ("USDA") and the Natural Resources Conservation Service ("NRCS")[2] were required to implement the

[2] On October 13, 1994, Congress authorized renaming the Soil Conservation Service ("SCS") as the Natural Resources

statutes as enacted and amended. These unambiguous statutes provide the USDA and the NRCS with the authority to implement rules, but not with the discretion to implement additional criteria in direct conflict with statutory intent or with the discretion to ignore existing statutory and regulatory provisions.

Congress enacted specific statutory criteria for "converted wetlands" and corresponding "exemptions" from program ineligibility. Thus, when a property owner's activities on a parcel of land fall within those "converted wetland" criteria and corresponding "exemptions," the USDA and the NRCS must recognize the "converted wetland" designation and "exemption." "The USDA and the NRCS do not have the discretionary authority to add criteria beyond the intent of Congress, especially when the additional criteria redefine "converted wetland" and the application of the corresponding exemptions."

Conservation Service ("NRCS"). PL-103-354, Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994.

ARGUMENT

I. THE EIGHTH CIRCUIT'S DECISION VIOLATES THE EXPRESS LANGUAGE OF THE WETLAND AND SWAMPBUSTER LEGISLATION AND FURTHERMORE FRUSTRATES THE INTENT OF CONGRESS.

A. STANDARD OF REVIEW

The Administrative Procedure Act ("APA") allows an individual to seek judicial review of agency action that constitutes a legal wrong or if the individual is affected adversely or aggrieved within the meaning of a relevant statute. Administrative Procedure Act, 5 U.S.C., Chapter 7-Judicial Review, §§ 702, 704, and 706. Section 706 states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The receiving court shall . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The APA requires the court to determine whether the agency based its decision on relevant factors or whether it made a clear error of judgment, which requires the court to set aside the decision as arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law. *Sierra Club v. U.S. Forest Service*, 46 F.3d 835, 838 (8th Cir. 1995). The Supreme Court requires the reviewing court to ensure that all relevant factors were considered by the agency and that no judgmental error occurred. *Citizens for Environmental Quality v. U.S.*, 731 F.Supp. 970, 983 (1989). In addition to a reasoned basis for its action, the agency must set forth that basis in the administrative record, including all relevant data and other factors. *Downer v. U.S. By and Through U.S. Department of Agriculture*, 97 F.3d 999, 1002 (8th Cir. 1996).[3] Under the APA, the court must:

> look[ ] to whether the agency considered those factors Congress intended it to consider, whether the agency considered factors Congress did not intend it to consider, whether the agency failed entirely to consider an important aspect of the problem; whether the agency decision runs counter to the evidence before it; or whether there is such a lack of rational connection between the facts found and the decision made that the disputed decision cannot "be ascribed to a difference in view or the product of agency expertise."

Id. at 1002 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

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[3] See also *Rauenhorst v. U.S. Department of Transportation, Federal Highway Administration*, 95 F.3d 715, 718-719 (8th Cir. 1996); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1996); *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 103 S.Ct. 2856, 2866-2867 (1983).

When analyzing an agency's interpretation and implementation of a particular statute, the court must first look at the intent of Congress as expressed in the statute. The Supreme Court has held:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S.Ct. 2778, 2781-2782 (1984)[4]. The analysis starts and ends with the statute itself. *Northern States Power Co. v. U.S.*, 73 F.3d 764, 766 (8th Cir. 1996).[5]

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[4] In FN9 of *Chevron*, the Court reaffirmed that the judiciary is the final authority on issues of statutory construction and must reject administrative constructions that are contrary to clear congressional intent. If an intent on the question at issue is identified, that intent is the law and must be given effect. See, e.g., *FEC v. Democratic Senatorial Campaign Committee*, 102 S.Ct. 38, 42 (1981); *SEC v. Sloan*, 98 S.Ct. 1702, 1711-1712 (1978); *FMC v. Seatrain Lines, Inc.*, 93 S.Ct. 1773, 1784-1785 (1973); *Volkswagenwerk v. FMC*, 88 S.Ct. 929, 935 (1968); *NLRB v. Brown*, 85 S.Ct. 980, 988 (1965); *FTC v. Colgate-Palmolive Co.*, 85 S.Ct. 1035, 1042 (1965); *Social Security Board v. Nierotko*, 66 S.Ct. 637, 643 (1946); *Burnet v. Chicago Portrait Co.*, 52 S.Ct. 275, 281 (1932); *Webster v. Luther*, 16 S.Ct. 963, 967 (1896).

[5] When the intent of Congress is clear from the words of the statute, that is the "end of the judicial inquiry." *Arkansas AFL-CIO v. F.C.C.*, 11 F.3d 1430, 1440 (8th Cir. 1993). Therefore, a

Thus, in reviewing the administrative action below, the court must determine if the specific statutes are unambiguous or silent. If unambiguous, the statutory language controls and the contrary view of the agency is rejected. If silent or ambiguous, the court must then determine whether the agency's regulations conflict with Congressional intent and whether the agency action is consistent with both the statute and the agency regulations.

B. STATUTORY AND REGULATORY PROVISIONS

With passage of the Food Security Act of 1985, 16 U.S.C. §§ 3821-3824, as amended; the Food, Agriculture, Conservation and Trade Act of 1990, PL-101-624; and the Federal Agriculture Improvement and Reform Act of 1996, PL-104-127; Congress expressed its intent to preserve and protect wetlands. However, in an effort to provide protection to property owners, Congress identified various exemptions to the provisions of the legislation.[6]

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court may not defer to the agency decision. When Congress leaves a statute silent or ambiguous, relative to a specific issue, an administrative agency has the power to make rules to fill the void left by Congress. *Chevron, supra.* See also *Wittler v. Chater,* 59 F.3d 95 (8th Cir. 1995) (the court will affirm the Secretary's interpretation "if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent) and *Northern States Power Co. v. U.S.,* 73 F.3d 764, 766 (8th Cir. 1996).

[6] The Eighth Circuit has dealt previously with the application of the new swampbuster and wetlands laws after a

Congress defined "wetland" as land that:

> (A) has a predominance of hydric soils;
>
> (B) is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
>
> (C) under normal circumstances does support a prevalence of such vegetation.

16 U.S.C.A. § 3801(a)(18). Congress then defined "converted wetland" as:

> [L]and that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if
>
> (i) such production would not have been possible but for such action; and
>
> (ii) before such action
>
> (I) such land was wetland; and
>
> (II) such land was neither highly erodible land nor highly erodible cropland.

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lower court judgment, but prior to a final decision on appeal. *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, 955 F.2d 1199 (8th Cir. 1992). The court held that in passing the Food, Agriculture, Conservation and Trade Act of 1990, PL-101-624, Congress intended retroactive application of the law when applying the "good faith exemption" status to property owners. *Id.* at 1204-1205.

16 U.S.C.A. § 3801(a)(6)(A). In 16 U.S.C.A. § 3821(a) and (c), Congress provided that property owners would be ineligible for USDA program loans and payments if the owner "produces an agricultural commodity on converted wetland. . . . " However, Congress provided various exemptions to ineligibility under § 3821, including:

> No person shall become ineligible under section 3821 of this title for program loans or payments under the following circumstances:
>
> (1) As the result of the production of an agricultural commodity on the following lands:
>
> (A) A converted wetland if the conversion of the wetland was commenced before December 23, 1985. . . .
>
> (G) A converted wetland if the original conversion of the wetland was commenced before December 23, 1985, and the Secretary determines the wetland characteristics returned after that date as a result of
>
> (i) the lack of maintenance of drainage, dikes, levees, or similar structures;
>
> (ii) a lack of management of the lands containing the wetland; or
>
> (iii) circumstances beyond the control of the person. . . .
>
> (2) For the conversion of the following. . . .
>
> (D) A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date as a result of

> (i) the lack of maintenance of drainage, dikes, levees, or similar structures;
>
> (ii) a lack of management of the lands containing the wetland; or
>
> (iii) circumstances beyond the control of the person.

16 U.S.C.A. § 3822(b).[7]

In order to implement the wetlands and swampbuster provisions of the Food Security Act of 1985, 16 U.S.C. §§ 3821-3824, as amended; the Food, Agriculture, Conservation and Trade Act of 1990, PL-101-624; and the Federal Agriculture Improvement and Reform Act of 1996, PL-104-127; the Secretary of Agriculture authorized the USDA and the NRCS to develop implementation rules, which are located in 7 CFR Subtitle A-Office of the Secretary of Agriculture, Part 12-Highly Erodible Land and Wetland Conservation, Subpart A-General Provisions, §§ 12.1-12.12 and Subpart C-Wetland Conservation, §§ 12.30-12.34.[8] The specific rules pertinent to this case are §§ 12.2(a)(6), 12.5(b)(1), 12.5(b)(2), and 12.33(b). In rule 12.2(a)(6), the USDA and the NRCS changed Congress' definition of "converted wetland" by adding:

---

[7] See FN4. In amending § 3822(b), Congress retained exemption (1)(A) and added exemptions (1)(G) and (2)(D). As with the 1990 amendments, Congress intended to apply legislation retroactively by identifying the date certain (December 23, 1985) for activities subject to the legislation.

[8] Authority is granted under 16 U.S.C. § 3801 *et seq.*

> . . . . that makes possible the production of an agricultural commodity without further application of the manipulations described herein. . . . [9]

The phrase "without further manipulation" has been placed in rule 12.5(b)(2), thus changing the intent of Congress.[10] Rule 12.33(b) also changed Congress's intent by restricting the use of established exemptions.[11]

---

[9] Thus altered, the statutory language read in regulation as:

> Converted wetland means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) **that makes possible the production of an agricultural commodity without further application of the manipulations described herein** if (i) such production would not have been possible but for such action; and (ii) before such action such land was wetland and was neither highly erodible land nor highly erodible cropland.

7 CFR § 12.2(a)(6). (Emphasis added).

[10] Thus altered, the statutory language reads in regulation as:

> The conversion of a wetland, for purposes of this section, is considered to have been completed before December 23, 1985 if before that date, the draining, dredging, leveling, filling or other manipulation, (including any activity that resulted in the impairing or reducing the flow, circulation, or reach of water) was applied to the wetland and made the production of an agricultural commodity possible **without further manipulation** described herein where such production on the wetland would not otherwise have been possible.

7 CFR § 12.5(b)(2). (Emphasis added).

[11] Thus altered, the statutory language reads in regulation as:

Unless otherwise provided in this part, the production of an agricultural commodity on wetlands that were converted before, or for which the conversion was commenced before, December 23, 1985, is exempted by law from these regulations for the area which was converted **or the minimum area the commenced activity could convert**. Maintenance or improvement of these converted wetlands for the production of agricultural commodities are not subject to this rule so long as such actions do not bring additional wetland into the production of an agricultural commodity. Additional wetland means any natural wetland or any converted wetland that has reverted to wetland as the result of abandonment of crop production. Abandonment is the cessation of cropping, management or maintenance operations related to the production of agricultural commodities on "converted wetland." Where the cessation of such cropping, management or maintenance operations has occurred, converted wetland is considered to be abandoned unless it is shown that there was no intent to abandon; provided, however, that at the end of five successive years during which there was no crop production, such land shall be determined to be abandoned if the land meets the wetland criteria of § 12.31. Participation in a USDA set-aside, diverted acres, or similar programs shall not be deemed to constitute abandonment. Furthermore, the maintenance of any alteration or manipulation that affects the reach or flow of water made to a wetland that was cropped before December 23, 1985, would not cause a person to be determined to be ineligible under this part, **provided that the maintenance does not exceed the scope and effect of the original alteration or manipulation, as determined by SCS, and provided that the area is not abandoned.**

C. THE UNITED STATES DEPARTMENT OF AGRICULTURE AND THE NATURAL RESOURCES CONSERVATION SERVICE FAILED TO CONSIDER ONLY THE FACTORS CONGRESS INTENDED THEM TO CONSIDER FOR ISSUING A "WETLAND," "CONVERTED WETLAND," AND CORRESPONDING "EXEMPTION" DECISION.

In enacting wetland and swampbuster legislation, Congress expressed its intent to exempt conversion activities commenced prior to December 23, 1985. In providing this conversion exemption, Congress specifically set forth the criteria for identifying converted wetland, which criteria have remained unchanged during all subsequent amendments. When Congress defined a drained wetland as a "converted wetland," if drained to produce an agricultural commodity or to have the effect of making agricultural commodity production possible, it did so clearly and unambiguously. Any change to the definition adopted by Congress, however minor, is a change in express statutory language and thus the intent of Congress and beyond the authority granted the agency by

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7 CFR § 12.33(b). (Emphasis added). By utilizing the agency's 1/8-inch drainage coefficient criteria in its "wetland" and "converted wetland" determination of Mr. Gunn's property, the USDA and the NRCS maintain that the original conversion would not have effectively drained 160 acres. Thus, they reduced the total number of acres originally converted with the 1906 drainage project. By reducing the total number of acres originally converted, the agency could then claim that additional "wetland" acres were converted with the intent to bring additional "wetlands" into agricultural production. Therefore, according to the USDA and the NRCS a violation occurred. See FN 10.

Congress. Congress knows "very well" how to mandate something. *Northern States Power Co. v. U.S.*, 73 F.3d 764, 767 (8th Cir. 1996). Congressional exclusion of drainage evaluation factors, hydrologic analyses, and evaluation of additional drainage manipulation activities in defining "converted wetlands" is a clear mandate to prohibit their application. Where the intent of Congress is clear, as it is here, it governs. *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, 955 F.2d 1199, 1204 (8th Cir. 1992) (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S.Ct. 1570, 1577 (1990)).

The USDA and the NRCS recognized that Mr. Gunn's property contained a tile drainage system, which was installed in 1906 to convert wetland to cropland. *USDA-NRCS, CPA Wetland Determination Appeal*, p. 3, August 9, 1994. All acreage in the quarter section was converted to cropland, including the acreage above the tile drainage system, and since then has been continuously cropped or enrolled in government set-aside programs.[12] Thus, these

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[12] The District Court's reliance on *Von Eye v. U.S.*, 92 F.3d 681 (8th Cir. 1996) and the Defendant's reference to *Von Eye, supra*, and *Downer v. U.S. By and Through U.S. Dept. of Agr.*, 97 F.3d 999 (8th Cir. 1996) as controlling in this instance are unwarranted. In both *Von Eye* and *Downer* the property owner brought additional wetlands into production with the identified conversion project, whereas here Mr. Gunn brought no new wetlands into production. According to the USDA and the NRCS regulations, maintenance and improvements of prior converted wetlands are not subject to the rule, provided "additional" wetlands are not brought into production. 7 CFR § 12.33(b). The rule continues by defining "additional" as any natural or converted wetland that has reverted to wetland as a result of abandoning crop production. The rule also states that

activities and lands fall clearly within the "converted wetland" criteria established by Congress, yet the USDA and the NRCS arbitrarily ignored those criteria and utilized their own criteria.[13] Utilizing their own criteria to evaluate Mr. Gunn's property, instead of the criteria set out by Congress, is a clear violation of a federal statute and the will of Congress. Thus, the contested acres should be exempt because the drainage activity converted the acres prior to December 23, 1985, in accordance with the statute and the will of Congress.

D. THE UNITED STATES DEPARTMENT OF AGRICULTURE AND THE NATURAL RESOURCES CONSERVATION SERVICE FAILED TO CONSIDER THE 1996 "WETLAND" AND "CONVERTED WETLAND" AMENDMENTS ENACTED IN THE FEDERAL AGRICULTURE IMPROVEMENT AND REFORM ACT OF 1996.

The addition of 16 U.S.C. § 3822(b)(1)(G) and (b)(2)(D) of the Federal Agriculture Improvement and

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non-production due to enrollment in the USDA set-aside programs is not abandonment. Since the 1906 installation of the tile drainage system, all 160 acres in the quarter section owned by Mr. Gunn have been farmed or enrolled in the USDA programs. Thus, even the USDA and the NRCS rules point to the logical conclusion: these acres are exempt from swampbuster. See FN 9.

[13] In the CPA-Wetland Determination Appeal issued on August 9, 1994, by the USDA-NRCS, the agency stated that the "converted wetland" determination was based upon a drainage system current capacity analysis utilizing a 1/8-inch drainage coefficient for removal of wetland hydrology and an estimate of potential ponding utilizing the drainage system topographical data. *USDA-NRCS, CPA Wetland Determination Appeal*, p. 3, August 9, 1994.

Reform Act of 1996, PL-104-127, which amended 16 U.S.C. § 3822(b), expands the list of statutory exemptions to agricultural program ineligibility. *Supra*, see discussion at I(B), pp. 6-9. These provisions provide a "converted wetland" exemption on acreage where the originally converted acreage has been returned to land with wetland characteristics due to a lack of drainage maintenance and circumstances beyond the control of the property owner. These amendments, adopted in 1996, provide additional evidence that Congress intended all drained, dredged, filled, leveled, or otherwise manipulated wetlands to be exempt from agricultural program ineligibility, if such manipulation was commenced or completed prior to December 23, 1985. As a result of its clear and unambiguous actions, Congress did not authorize the USDA and the NRCS to act as they have in this case. The agencies must interpret and apply the statute as written. Mr. Gunn's land is exempt from ineligibility by an Act of Congress.

The USDA and the NRCS have argued that the acreage in question was not a "converted wetland" at the time of December 23, 1985, because the acreage exhibited wetland characteristics. *USDA-NRCS, CPA Wetland Determination Appeal*, p. 3, August 9, 1994. This argument fails for two reasons. First and foremost, the 1996 amendment provides that any such acreage returning to wetland characteristics will still be exempted from ineligibility. 7 CFR § 12.33(b). Second, the determination of the USDA and the NRCS exceeds the delegated Congressional authority and violates the intent of Congress. Food Security Act of 1985, 16 U.S.C. §§ 3821-3824, as amended; Food, Agriculture, Conservation and Trade Act of 1990, PL-101-624;

and Federal Agriculture Improvement and Reform Act of 1996, PL-104-127.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant *certiorari* to review the Eighth Circuit's decision in the instant case. Congress expressed its intent to protect national wetlands, but not at the expense of eliminating agricultural acreage. Congressional exemptions to swampbuster provisions allow property owners to continue to use prior "converted wetlands" without incurring USDA program ineligibility. The failure of the USDA and the NRCS to utilize existing statutory criteria in identifying Mr. Gunn's 160 acres as a prior "converted wetland," due to the installation of the 1906 tile drainage system, is not within the agency's delegated powers. The USDA and the NRCS erred when they decided that Mr. Gunn's property was not prior "converted wetland;" thus, that decision must be reversed.

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